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MICHIGAN REPORTS

CASES DECIDED

IN THE

SUPREME COURT

OF

MICHIGAN

FROM

NOVEMBER 14, 1899, TO FEBRUARY 20, 1900

JOHN A. BROOKS

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² To January 1, 1900.

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OCTOBER TERM, 1899.*

WETHERBEE v. MICHIGAN CENTRAL RAILROAD CO.

MUNICIPAL CORPORATIONS—CONTRACT WITH RAILROAD—OVERHEAD CROSSING—ULTRA VIRES.

A city, pursuant to a vote of the electors, entered into a contract for the payment of a sum of money to a railroad company for erecting a bridge to carry over the tracks a street that had formerly been crossed at grade. The company agreed to maintain the masonry and foundations, but turned the superstructure and approaches over to the city, which took possession, and thereafter made certain repairs, resulting in an accident by which plaintiff was injured. It did not appear that the company was under any legal obligation to change the grade crossing to an overhead crossing. *Held*, that, even if the contract of the city was *ultra vires*, the company was not liable for the injuries.

Error to Wayne; Carpenter, J. Submitted October 24, 1899. Decided November 14, 1899.

Case by Edson Wetherbee against the Michigan Central Railroad Company for personal injuries. From a judgment for defendant on verdict directed by the court, plaintiff brings error. Affirmed.

Lehman Bros. and *F. J. Riggs*, for appellant.

Henry Russel (Lawrence & Butterfield, of counsel), for appellee.

MOORE, J. The tracks of the defendant extend along the valley of the Huron river, which divides Ann Arbor into upper and lower town. The street from lower town branches into two streets leading into the upper town

*Continued from Vol. 121.

about where the railroad track crosses the streets. The railroad track was laid in 1838, and until about 1886 crossed the streets at grade. The streets between the lower and upper town had a great deal of traffic upon them, and from the railroad track to the upper town the grade of the streets for a long distance was very considerable. The railroad company was about to build a new station, and to make very considerable changes in its yard. It was desirable, not only for the railroad company, but for the public, that these important streets, instead of crossing the railroad tracks at grade, and at the foot of a long, steep hill, should be carried over the railroads, thus avoiding in part the grade and the dangers incident to a grade crossing. To accomplish this purpose, it was necessary to carry the streets over the railroad tracks upon a bridge. The common council entered into negotiations with the railroad company for the purpose of bringing about this result. It submitted the question of raising \$5,000 for the purpose of building this bridge to the taxpayers, who voted, at an election, authority to raise that sum to build the bridge. The city then entered into a contract with the railroad company, by which, among other things, it was to construct a bridge over its tracks, connecting Pontiac and Broadway streets, with approaches of a grade not exceeding 6 feet in 100. The railroad company agreed to maintain the masonry and foundations of said bridge at its own expense, and, when completed, "to deliver the said bridge and its approaches, with sidewalks and fences, as aforesaid, into the possession of said city, free of all liens." The city paid to the company the \$5,000 which it agreed to pay. The railroad company performed its part of the contract, including the building of the bridge, which it put into possession of the city, and over which the city afterwards exercised, by its proper officers, control.

In March, 1895, the plaintiff was injured because of alleged defects in the planking of the bridge, and sued the defendant to recover damages. The circuit judge directed

a verdict in favor of the defendant for reasons he stated as follows:

"This bridge upon which the plaintiff was injured was erected under an agreement between the city of Ann Arbor and the railroad company. That agreement, without undertaking to read it to you, contained these significant provisions: That the railroad company, after it was built, would maintain the foundations and masonry, and it would turn the possession of the bridge and the approaches over to the city of Ann Arbor. Now, looking at the agreement alone, clearly its proper legal construction would imply that, after the bridge was built and turned over to the city, the burden of maintaining the superstructure would be upon the city, and not upon the railroad company. I do not think that proposition can be seriously controverted. But it is insisted that legal effect cannot be given to that agreement, because it is contended that the law placed upon the railroad company the legal obligation of maintaining this superstructure, and therefore the city of Ann Arbor could not relieve the railroad company from that obligation, and itself assume it. In support of this contention, plaintiff's counsel call my attention to two cases, one in the State of Massachusetts and one in the State of Iowa. In those cases it was decided that, where a railroad company built a bridge over a highway crossing, a municipality had no right to enter into an agreement relieving it (the railroad company) from the obligation to keep the bridge in repair. Now, at first blush it seems as though those cases control this case, and the strong way in which they were presented made me question what I otherwise supposed was settled law; but reflection and study and comparison of those cases with this has led me to the conclusion that they have no application here. In those cases there was a clear legal obligation on the part of the railroad company to build that bridge. It had to build it in order to put the highway in the condition which the law required it to be put in by the railroad company, and there followed a legal obligation to maintain that bridge; so that there was no reason and no consideration for the municipality agreeing to take that burden upon itself. Now, is there, in this case, any such obligation? It appears that, for a good many years before this bridge was built, there was a grade crossing at this point. The railroad company was under no legal obligation to change that grade crossing into an overhead crossing. It is

argued that it might have been made to assume that obligation if proper action had been taken before the commissioner of railroads. That is possible. It is possible that the circumstances are such that, if they had all been presented to the railroad commissioner, he would have said that public convenience and public safety at that point demanded such a change to be made. But he did not say that. The case was not presented to him, and, until he did say so, there was no legal obligation upon the railroad to make that change. The city of Ann Arbor chose, instead of that, to enter into an agreement whereby that change should be made. In other words, the railroad company never was placed in a position where there was any legal obligation resting upon it to build this bridge, and, consequently, no legal obligation to afterwards maintain it. So that I am clearly of the opinion that the Massachusetts case and the Iowa case do not control this case, and furnish no precedent for its decision."

From this action of the trial judge the plaintiff appeals, contending:

1. That the contract between the city and the railroad company was *ultra vires*, and therefore void.
2. That the railroad company could not, by contract, escape its liability to respond in damages for injuries received at street crossings.
3. That, even though the city was liable, the railroad company was also liable.

The counsel cite many authorities, but rely chiefly upon *Dygart v. Schenck*, 23 Wend. 446 (35 Am. Dec. 575); *Kelly v. Railroad Co.*, (Sup.) 9 N. Y. Supp. 90; *Tierney v. City of Troy*, 41 Hun, 120; *Gates v. Railroad Co.*, 150 Pa. St. 50 (16 L. R. A. 554); *City of Newton v. Railway Co.*, 66 Iowa, 422; *Rouse v. City of Somerville*, 130 Mass. 361. We do not think any of these cases is conclusive in favor of the contention of counsel. All of these cases, except the first one, were cases where the law imposed upon the railroad company the duty to keep the crossing or the bridge in repair. In most of the cases the duty was imposed by the statute. In the case of *Dygart v. Schenck*, *supra*, the following language is used:

"Had the town agents actually taken the bridge under

their care, and repaired it for a long time, there might have been a question for the jury whether they had not made it a town bridge."

So far as this case has any bearing upon the controversy, it is in favor of the position of the defendant.

The case at bar is not the case of an injury at such a crossing as the railroad company was under legal obligation to maintain. For many years it maintained its tracks across the streets at grade. No action was taken by which it could legally be compelled to keep anything but a grade crossing in repair. Because of the public benefit to accrue therefrom, the common council made an arrangement by which the streets should be extended over the tracks of the railroad at its expense. So far as the superstructure was concerned, the bridge was to be under the control of the city, to be maintained at its expense.

It is not necessary for us to inquire, in this proceeding, whether the city exceeded its authority in making this arrangement or not. It in fact caused the bridge to be built. It took control of it, and, through its street commissioner, caused the pieces of plank to be nailed on the bridge which the declaration averred, and the testimony offered by the plaintiff tended to show, caused the accident.

The circuit judge was right in his disposition of the case. Judgment is affirmed.

The other Justices concurred.

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HENRY v. HENRY.

1. TRIAL—INSTRUCTIONS—COURT'S OPINION OF MERITS.

For the trial judge to give an instruction which, standing alone, might be taken as an indication of his opinion of the merits of the controversy, but which, in connection with the testimony and the remainder of the charge, is not calculated to be so understood by the jury, does not warrant a reversal.

2. ADVERSE POSSESSION—FARM—TIMBER LAND—EXTENT OF OCCUPANCY.

It is not essential to adverse possession of farm land that the entire farm, including timber lands, be cleared and cultivated, but it is sufficient if it is all held as one farm, and such use is made of the whole as farmers are accustomed to make of land of the character of that in question.

Error to Sanilac; Beach, J. Submitted October 25, 1899. Decided November 14, 1899.

Ejectment by Ida M. Henry against John Henry and others. From a judgment for defendants, plaintiff brings error. Affirmed.

C. F. Gates, for appellant.

J. S. Crandell, for appellees.

MOORE, J. The plaintiff is the owner of the record title to the S. W. $\frac{1}{4}$ of section 30. The defendant John Henry is the owner of the record title to the W. $\frac{1}{4}$ of the S. E. $\frac{1}{4}$ of said section. As we understand the record, the other defendants are tenants of John Henry. This action was commenced April 15, 1897. The dispute arises over the line between these two descriptions of land. It is the claim of the plaintiff that defendants withhold from her a strip of land the entire length of defendants' farm, 12 rods wide, which plaintiff owns. To recover that strip of land, she has brought this action in ejectment. The case was

tried by a jury, who rendered a verdict in favor of the defendants. From the judgment entered upon said verdict, the plaintiff brings the case here by writ of error.

It is claimed by plaintiff that, though section 30 purports to be a full section, the government surveyors made a mistake in running the section lines east and west, and, instead of making them a mile long, as they should have done, made them nearly 24 rods less than a mile. It is her claim the south quarter post of the section, instead of being 160 rods west of the southeast corner of the section, should be but a trifle more than 148 rods west of the southeast corner. It is the claim of the defendant Henry that, when the land was surveyed, the quarter posts of said section were placed a half mile west of the east line of said section. This claim was controverted by the plaintiff, who contended they had either never been set or had been lost. It was also the claim of the defendant Henry that as early as in 1880 he cleared his land as far west as the quarter post, and made a log and brush fence upon the quarter line between his land and that of the plaintiff, which fence remained until destroyed by fire, in 1881; and that another fence was built upon the same line, which was destroyed by fire a little later, but was rebuilt. He contends that, for more than 15 years before the commencement of the suit, his clearing extended back about 80 rods to the quarter line, with a fence between his lands and the land of the plaintiff; and, as to the north portion of his farm, he claims it was timber land used in connection with the rest of his farm, he cutting timber therefrom according to his needs, and using it for pasture. He also contends that the father of the plaintiff used the land west of the fence as a farm, each claiming to be the owner of all the land occupied by each. He also claims that the father of plaintiff, from whom she derived title, who died shortly before this suit was brought, occupied only up to the quarter post and the fence before described, and acquiesced in the occupancy of the defendant, as before stated. These claims of the defendant were dis

puted by the plaintiff, and the parties offered testimony tending to show the truth of their respective claims.

The plaintiff now says there was no testimony to show defendant Henry had been in possession, up to what he claims was the quarter line, for 15 years, and the court should not have submitted that question to the jury. We cannot agree with the counsel. While it was a controverted question, there is a good deal of testimony tending to show the claim of defendant to be true, and it was a proper question for the jury. *Whitford v. Crooks*, 54 Mich. 261; *McCall v. Wells*, 55 Mich. 171.

Most of the questions argued have been settled by repeated decisions of this court growing out of disputes about boundary lines, and it is not necessary to go over them again here. The plaintiff strenuously insists that the court prejudiced her case by indicating his opinion of the merits of the controversy by that portion of his charge reading as follows:

“Now, gentlemen of the jury, you may take this case under these instructions, and determine these questions as to who is entitled to the land in question,—whether Mr. Henry is to be disturbed in his possession, and is to surrender 12 acres of land on the east side of the line, or not.”

Standing alone, this language would form some basis for the claim of counsel, but it must be taken in connection with the testimony and the rest of the charge. The testimony all showed that, as to the front portion of the farms, there had been a fence between the two farms for some years,—how long was a matter of dispute,—which was spoken of by the witnesses as the line between them. It was the claim of the plaintiff that she was entitled to 12 acres east of that line. As before stated, this claim was disputed by defendants. After stating the respective claims, and the law applicable thereto, at length and fairly, the court used the following language:

“Now, gentlemen of the jury, you may take this case under these instructions, and determine these questions as

to who is entitled to the land in question,—whether Mr. Henry is to be disturbed in his possession, and is to surrender 12 acres of land on the east side of the line, or not. If you find that he is, then there is another question to be determined, and that is, under the testimony here, as to the improvements which have been made: *First*. To what extent have the improvements and buildings increased the present value of the land over what would have been the value if it was left alone? *Second*. What would be the present value of the land—the premises—without the buildings and the improvements, and any waste, if any, which has been committed; that is, what would be the value of the land today if no improvements were made or buildings erected, and the land had remained without waste and without any improvements? Now, those two questions, if you shall find for the plaintiff, are to be answered in your verdict: *First*. To what extent have the improvements increased the value of the land? *Second*. What would be the present value of the land without improvements?”

It is very evident the court had no thought of indicating to the jury his impression of the merits of the case. The counsel evidently had no such thought at that time, for the record does not disclose that they indicated to the court his language might mislead the jury, and requested him to correct it. When taken in connection with the rest of the charge and the evidence in the case, it is clear the jury were not misled by it.

Counsel for plaintiff asked the court to charge “that adverse possession, so far as the boundary is concerned, does not extend beyond the ground actually occupied.” The judge told the jury that it appeared from the evidence the clearing is not extended the whole length of the half mile between the parties, and that occupancy need not be to the extent that the ground is actually cleared and cultivated, but it would be sufficient if it is within one description, and has been occupied for any purposes connected with ordinary farm usage. Counsel says this was error. In *Murray v. Hudson*, 65 Mich., at page 674, it is said:

“If Bryce entered upon this land under his deed from

Kitten, and used it thereafter as a wood lot appurtenant to his farm in the usual and ordinary way, and exercised such acts of ownership over it as were necessary to enjoy such usual and ordinary use of a wood lot, such acts, being continued and uninterrupted, would amount to actual possession, and such possession, being under color of title and a claim of right, and exclusive, held so openly and notoriously that the community understood and recognized his claim of ownership, would be adverse."

In this case it was the claim of defendant Henry that, when he took possession of the land, it came within the description of his deed, that he occupied all of it as one farm, and the timber land was occupied as any farmer would occupy his timber land. The case comes within *Murray v. Hudson*, *supra*. See, also, *Sparrow v. Hovey*, 44 Mich. 64; *Curtis v. Campbell*, 54 Mich. 340; *Cook v. Clinton*, 64 Mich. 309 (8 Am. St. Rep. 816); *Sauers v. Giddings*, 90 Mich. 50.

Judgment is affirmed.

The other Justices concurred.

FRANCIS v. FRANCIS.

SPECIFIC PERFORMANCE—ALIENATION OF HOMESTEAD—WIFE'S SIGNATURE.

Complainant, at the solicitation of his parents, agreed to remain at home and provide for them, in consideration of which his father promised that whatever he should die possessed of should go to the son. Subsequently the parents joined in a deed of the homestead, to be held for the son in escrow, and delivered to him at his father's death. After the death of the father, complainant discovered a clause in the deed, of which he claimed to have been ignorant theretofore, declaring that title should not pass to him until the mother's death. Subsequently, a controversy having arisen over the possession of the premises, he filed a bill against his mother for specific per-

formance. *Held*, that, inasmuch as the deed itself expressly reserved the title until the mother's death, there was no alienation of the homestead, signed by her, upon which complainant's right thereto could be predicated as against her, and that any parol agreement or understanding was void under article 16, § 2, of the Constitution.

Appeal from Ionia; Davis, J. Submitted October 27, 1899. Decided November 14, 1899.

Bill by Fred L. Francis against Phebe L. Francis and others for the specific performance of an agreement for the conveyance of land. From an order overruling her demurrer to the bill, defendant Phebe L. Francis appeals. Reversed.

R. A. & W. E. Hawley, for complainant.

Chaddock & Scully, for appellant.

MOORE, J. Complainant filed a bill in chancery in which he averred, in substance, that he is the son of Ephraim and Phebe L. Francis; that Ephraim Francis was the owner of a lot in Portland, which he occupied with his wife as a homestead, which was of the value of \$500. He avers he had planned to go from home to work, and that, yielding to the solicitations of his parents, and relying upon a promise of his father that whatever the father had at the time of his death in the way of property should belong to the complainant, he abandoned his plan of going away, and remained at home, working in the shop of his father and supporting his parents. He avers his father afterwards died, and that he paid the expenses of his illness, funeral, and burial. He avers that in 1888 his father and mother made him a deed of the said lot, which was delivered to his mother in escrow, to be delivered to the complainant upon the death of his father; that his mother afterwards delivered the deed, which complainant had recorded. Many things are stated in the bill which it is not necessary to mention here. It is

averred that the deed contained a clause reading as follows: "It being hereby expressly understood that the title from the said first parties does not pass in the above-described property to the said second party until the death of both the said Phebe L. Francis and Ephraim Francis,"—of which complainant had no knowledge until June, 1898. He avers that it was represented to him, after he discovered the clause in the deed, that his mother had a life lease in said premises, and, supposing this was true, he consented to lease the premises of her if she would join with him in a new mortgage upon the premises. The bill avers that the lease was made under a mutual mistake of law and fact, and that a fair interpretation of the deed is that complainant was to furnish his mother with a home on the premises, which he is now, and always has been, willing to do. The bill avers that the mother of complainant insists that the relation between her and the complainant is that of landlord and tenant, and has commenced summary proceedings to obtain possession of the premises. It prays for specific performance of the agreement between complainant and Ephraim Francis, that the lease may be canceled, and for other relief, which it is not necessary to mention further. The defendant Phebe L. Francis demurred to the bill. From a decree overruling the demurrer, she has appealed.

We think the demurrer should have been sustained. Under the provisions of section 2, art. 16, of the Constitution, the homestead of Mrs. Francis could not be alienated except by her signature to the paper creating the alienation. It has been held over and over again that any conveyance of the homestead without the signature of the wife is void. See the many cases cited in note, page 122, 1 Comp. Laws 1897. The only deed Mrs. Francis signed provided that the title to the premises should not pass until the death of both of the grantors. The bill of complaint shows that Mrs. Francis is yet living. Any parol agreement she may have made in relation to the land is void. By the terms of the deed, the title has not

yet passed to the complainant, and it is not competent for the court to decree it to pass. With this construction of the deed, the other allegations of the bill do not afford reasons for the interference of a court of equity.

The decree is reversed. The demurrer to the bill of complaint is sustained.

The other Justices concurred.

HALL v. MANN.

TAXATION—PURCHASE OF STATE LANDS—NONPAYMENT OF CURRENT TAXES.

An applicant to purchase state tax land, who deposits with the auditor general a sum sufficient to pay all taxes constituting a lien thereon, but without advising him of an unpaid current tax, is not entitled to a deed of the land as against a subsequent applicant who pays the current tax, and tenders to the auditor an amount sufficient to cover all demands against the land.

Appeal from Muskegon; Russell, J. Submitted October 24, 1899. Decided November 14, 1899.

Petition by Alice A. Hall against M. E. Mann and George F. Brown to set aside a tax deed. From a decree for petitioner, defendants appeal. Affirmed.

Brown & Adams, for petitioner.

Black & Brown, for defendants.

HOOKER, J. The premises in controversy in this proceeding belonged to Alice A. Hall, and were bid in for the State for taxes in 1893. On February 17, 1897, the defendants filed the following application with the auditor general:

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137	68
122	13
149	230

"LANSING, MICH., Feb. 17, 1897.

"HON. AUDITOR GENERAL.

"*Sir*: Application is hereby made to purchase on the following list of lands of M. E. Mann and Geo. F. Brown, of Flint, Mich. Amount handed you herewith, \$5.00.

[Signed] "M. E. MANN and GEORGE F. BROWN,
"Flint, Mich."

It contained a description of the land in dispute, and no other, and five dollars accompanied it. On March 23d the auditor general received the following communication, inclosing \$33.63:

"LANSING, MICH., March 23, 1897.

"HON. AUDITOR GENERAL.

"*Sir*: Referring to serial No. 7,260, we herewith inclose \$33.63 to complete purchase.

[Signed] "M. E. MANN,
"Olio."

On May 19, 1897, M. C. Kelley wrote a letter to the auditor general on behalf of Mrs. Hall, saying that he had discovered that the property was sold for the taxes of 1896, and that it was a mistake, because he had paid the taxes, except drain taxes, which had been set aside by the court. He inclosed tax receipt, and asked that the sale be canceled. He also stated that he found that the N. E. $\frac{1}{4}$ of S. W. $\frac{1}{4}$ (being the N. $\frac{1}{2}$ of the premises in dispute) had been sold for 1893 for \$7.38, which he supposed was paid, and he applied for a deed for Alice A. Hall, with the promise to send amount necessary to be paid when informed of it. Evidently the auditor informed him that there was an earlier application, as Kelley's next letter, written on May 26, 1897, asked for the name of such applicant, and stated that Mrs. Hall was the owner of the land, and asked if there was any way in which she could save her title. On July 6, 1897, the auditor general issued a deed to the defendants, and with it the auditor general returned \$15.73. Mrs. Hall had paid these taxes for 1896 on May 25, 1897, to the county treasurer, the amount being \$13.09. She subsequently made application to purchase the title, and for a deed of the land, offer-

ing to pay all taxes and charges, interest and costs, required, and accompanied the application by a tender of a sufficient sum to cover the demands against the land, and asked that a certificate of error be given her. This was refused, and a petition was filed in the circuit court asking that the auditor general be required to issue a certificate of error, and for other relief. See *Hall v. Mann*, 118 Mich. 201. After the filing of said petition, and on December 17, 1898, the defendants returned to the auditor general the \$15 which they had received from him, and applied for a receipt for the taxes of 1896. The circuit court declared defendants' deed null and void, and directed the auditor general to issue a certificate of error annulling the deed, and, upon receiving the money tendered, to issue a deed to the petitioner, Mrs. Hall.

It is agreed that the only question in the case is whether the defendants were entitled to a deed under their application and deposits of February 17 and March 23, 1897. Their counsel rely upon the cases of *Eldridge v. Richmond*, 120 Mich. 586, and *Wilkin v. Keith*, 121 Mich. 66. The former holds that a proper application and deposit entitle the applicant to a deed as upon a complete purchase, and that the auditor general has no right to refuse it. The latter case is said to show that the defendants were purchasers. A reference to the various cases including and following *Hughes v. Jordan*, 118 Mich. 27, will show much controversy over the question there decided. It has been insisted that the rule worked hardship upon persons who desired to purchase lands from the State, who, if they paid all claimed by the auditor general, might find later that some other person had anticipated them in the payment of current taxes, thus invalidating their purchase; or, if they took time to pay the tax to the local authorities, they might be too late to buy the land from the State. It is said that we held in *Wilkin v. Keith* that it was competent to pay all to the auditor general, and this is true. The position of the defendants in this case is that, by sending with their application a

sum large enough to cover all taxes that might be a lien, they became purchasers, notwithstanding the fact that neither the auditor general nor themselves knew that there was a current tax unpaid, and notwithstanding the fact that the auditor general returned, and they accepted, a portion of their money, after it became evident that there was no tax returned. It is probable that neither party considered the current tax, the case of *Hughes v. Jordan* not having been decided at the time of these occurrences. But it makes no difference. The case of *Wilkin v. Keith* is not authority justifying the practice of depositing a gross sum large enough to surely cover all taxes, and leaving the auditor general to ascertain whether there is an unreturned tax outstanding. There is no exigency that requires it. *Wilkin v. Keith* clearly shows what a would-be purchaser may do if he wishes to be safe, and, if he cannot take time to take the necessary steps, he must take the chances of losing his purchase. *Wilkin v. Keith* holds that a purchaser should know whether or not he wants to pay a current tax not returned, and, if so, should inform the auditor general of the fact and the amount, as the following brief quotation shows:

“A man desiring to purchase state tax lands can ascertain the amount of current taxes due before making his application to purchase, and either by producing a statement that shall be satisfactory evidence to the auditor general of the amount of such taxes, or by conveying to the auditor general information that such tax remains unpaid if he cannot procure an official statement that the auditor will recognize, and paying him the amount in addition to the other amounts necessary, as shown by the auditor's records, can secure his legal rights as a would-be purchaser, without being subjected to any risks whatever.”

The decree of the circuit court is affirmed, with costs.

The other Justices concurred.

BERRY v. ADAMS.

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136	572

WITNESSES — MATTERS WITHIN KNOWLEDGE OF DECEDENT — ASSIGNORS.

One entitled to have property devised to her, who yields her claim, and consents to its being devised to her children, is an assignor, within 3 Comp. Laws 1897, § 10212, prohibiting an assignor of a cause of action from testifying to matters equally within the knowledge of a deceased defendant, and, in an action by the children, cannot testify to promises made by the deceased to her to leave it to them.

Appeal from Genesee; Wisner, J. Submitted October 27, 1899. Decided November 14, 1899.

Bill by Henriette Berry and another, infants, against Edwin M. Adams and Alexander W. Davis, as administrator with the will annexed of the estate of Hannah Harris, deceased, to establish a trust in property devised to defendant Adams. From a decree dismissing the bill, complainants appeal. Affirmed.

A. E. Gibson (*M. J. Lehmann*, of counsel), for complainants.

Henry C. Van Atta (*Rollin H. Person*, of counsel), for defendant Adams.

HOOKER, J. In 1868, Rose Marsh was left an orphan, at the age of 14, by the death of her father; her mother having died when she was 2 years old. After her mother's death, she lived with her aunt Mrs. Griswold until 1863. From that time she lived with another aunt, Hannah Harris, and Mrs. Griswold, until 1866, after which she lived with Hannah Harris. After her father's death, her aunt Hannah Harris obtained from her step-mother \$300 in settlement of her claims against the estate

of her father, being appointed guardian of Rose Marsh for the purpose. The money was used to pay a mortgage upon the home of Hannah Harris, where she and Rose resided. The complainants are children of Rose Marsh. It is claimed on their behalf that, by agreement between Hannah Harris and the child Rose Marsh, this money was to be used to pay off the mortgage, that they were to live upon the premises together, and that Rose Marsh was to have the property at the death of her aunt. It is said that, acting under this agreement, they occupied the premises together; that Hannah worked out as a domestic, and Rose as a school teacher; and that in 1873, by their mutual efforts, they succeeded in rebuilding the house. Rose Marsh became of age in 1875, and married John Berry in 1877. Complainants are children of this marriage. It is alleged further that John Berry was not a good manager, and that on Christmas night, 1888, a new arrangement was made. Mrs. Berry is the only witness who testified to this arrangement, and she said:

“On Christmas night we got to talking over matters in general, and she inquired into my husband’s affairs and into the condition of our affairs. My husband was running the store that had formerly been my uncle’s; and she was inquiring whether we had got it paid for, how much we owed on it, etc. I says, ‘No, we have a mortgage on it to a certain amount.’ She rather inferred that my husband would not be able to pay for it. She did not admire his financiering at all. She says, ‘It will be the same with my place if I leave it to you entirely.’ She had always referred to the place, when speaking of it, as ‘mine.’ She says: ‘It will be the same. Your husband will not be able to keep it long. It will be gone and squandered. And I think, if you are willing, it will be better for me and you and all concerned to make my will in favor of your children. It will be your home just the same. You can do just as you like. I think it will be the better plan if you are willing.’ Consequently, I thought, if it would please her,—I knew she did not like my husband very well,—I thought maybe it would please her, and make less hard feeling between them. I says: ‘I don’t care. If it would please you any better, do so.’ She

says, 'I will.' We talked about it some time. That was the lengthy part of the conversation. It was understood then and there that she was to do it.

"*Mr. Person:* You are telling what she said, are you not?

"*A.* I am.

"*Q.* Tell all that was said?

"*A.* As near as I can remember.

"*Q.* All you remember?

"*A.* Yes, sir.

"*Q.* That is what you meant when you said it was understood?

"*A.* I had understood that it was to be in the children's name—my two children's name—in her will in place of my own, as she had always agreed to will everything she had to me, and, instead of willing it to me, she was to will it to my two children. That was in 1888. She died in 1894, July 1st."

On cross-examination she said:

"*Q.* Will you state the language used by each of you as near as you can?

"*A.* As near as I can— I can't give the exact conversation. It was something after this manner: 'Your husband will use it up. You will not have any home for yourself, and you won't be any better off than you are now. Consequently, I think it better to fix that so that he cannot use it; and, if I make my will to the children, your husband will be unable to dispose of it. If this is agreeable to you, Rose, and you don't care, we had better have that arrangement made, and I will have my will made in favor of your children in place of you.' I answered after this manner: 'If it will please you, aunt, I don't care. It will do my children more good than it will me.' That is the substance of it."

A witness named Davis testified that he drew such a will in 1892 or 1893, and that Hannah Harris destroyed it later, and made a will devising the homestead to the defendant Adams, and some personal property to Mrs. Berry.

The bill seeks to establish a trust in favor of the children of Rose Marsh Berry under the contract and arrangement mentioned. It was dismissed by the circuit court, and the complainants have appealed.

It is manifest that the testimony of Rose Marsh Berry is indispensable to the complainants, for without it their case is not proved. Her testimony was taken under the objection that it was incompetent, under the statute, as being in relation to matters equally within the knowledge of the deceased. Were Rose Marsh Berry seeking to enforce the original contract in her own name, there can be no doubt that the objection to her testimony would be good. It is also true that, if the complainants were assignees of her rights under that contract, the objection would be good, because the statute prohibits testimony by assignors. See 3 Comp. Laws 1897, § 10212. Counsel for the complainants make an ingenious argument in support of the claim that Rose Marsh Berry is not an assignor to the complainants. It is true, nevertheless, that, previous to the talk on Christmas night, Rose Marsh Berry, if any one, had a right to have this property devised to her; and the claim here is that the complainants have acquired these rights. She did not sell them to complainants, but she claims that, upon request of Hannah Harris, she consented that the property should be devised to them instead of to herself. To all intents and purposes it was a gift to them of her claim, if it was anything, and, in effect, an assignment to them of her rights. She was, therefore, prohibited from testifying by the statute, as she would have been had she attempted to enforce the alleged contract upon her own behalf.

The decree is affirmed.

The other Justices concurred.

BECK v. FINN.

1. TAXATION—PURCHASE OF STATE LANDS—WRIT OF ASSISTANCE

A purchaser of state tax land may maintain an application for a writ of assistance to put him in possession of the premises and cannot be compelled to resort to an action at law.

2. APPEAL—OBJECTIONS NOT MADE BELOW.

An objection not made below will not be considered on appeal

Appeal from Bay; Maxwell, J. Submitted October 24, 1899. Decided November 14, 1899.

Petition by Louis Beck against Maggie Finn for a writ of assistance. From an order dismissing the petition, petitioner appeals. Reversed.

Albert McClatchey, for petitioner.

Simonson, Gillett & Courtright, for respondent.

MOORE, J. At the annual tax sale held in Bay county in December, 1894, a parcel of land in Bay City, Mich., described as "Lot 4 of block 114, plat of Lower Saginaw," was bid off to the State for the taxes assessed thereon for the year 1892. The land was not redeemed. On the 18th of September, 1897, the petitioner, Louis Beck, purchased the land from the State, and on November 6, 1897, a deed conveying the same to him was issued by the auditor general. On January 18, 1898, he claims a notice in compliance with the provisions of section 140 of the tax law (Act No. 229, Pub. Acts 1897) was served on the respondent, Maggie Finn, the grantee under the last recorded deed of the land. On the 24th of April, 1899, the petitioner made application to the circuit court for the county of Bay, in chancery, for a writ of assistance to put him in possession of the land. The respondent was represented by counsel, but the petition filed in the cause was

not answered. The court made an order denying the application for a writ of assistance, giving as his reason therefor that he thought the question involved should be submitted to and disposed of by a jury. From this order the petitioner appeals.

It is now claimed by respondent that, even though the circuit judge gave a wrong reason for his disposition of the case, his decision ought to stand, because the petitioner made no sufficient showing to entitle him to the relief for which he prayed. To this argument petitioner replies that the circuit judge had adopted the following rule of practice: "That the petition and answer and other pleadings in tax cases, the facts set forth and sworn to and not denied by either party, are to be taken as admitted as true." He says no answer was made to his petition, and no opportunity was given to put in the testimony he was prepared to offer.

The circuit judge was in error in supposing that cases of this character should be tried only in an action at law (*Ball v. Ridge Copper Co.*, 118 Mich. 7); and there is nothing to indicate any question was raised before him that petitioner was not entitled to relief because he had not, by proof, made a case. The petitioner should be allowed to introduce such competent testimony as he desires in the case.

The decree is reversed, and the case remanded for further proceedings.

The other Justices concurred.

STARBARD *v.* DETROIT, GRAND HAVEN & MILWAUKEE
RAILWAY CO.

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RAILROAD COMPANIES—PERSON ON TRACK—GROSS NEGLIGENCE.

Where, in an action against a railroad company for causing the death of plaintiff's intestate, it appeared from the undisputed testimony of the engineer and fireman of defendant's train that they gave proper signals of warning when they saw decedent on the track some distance ahead of the train, and that he, in apparent recognition of the signals, made a movement as if to step out of the way, but resumed his position of danger too late to permit of the train's being stopped in time to avoid striking him, it was error to permit the jury to find a verdict for plaintiff upon the theory that the failure to stop the train in time was due to the wanton and willful negligence of defendant's servants.

Error to Kent; Adsit, J. Submitted October 24, 1899.
Decided November 22, 1899.

Case by Jennie M. Starbard, administratrix of the estate of Melvin Starbard, deceased, against the Detroit, Grand Haven & Milwaukee Railway Company, for the alleged negligent killing of her intestate. From a judgment for plaintiff, defendant brings error. Reversed.

E. W. Meddaugh (*Geer & Williams*, of counsel), for appellant.

John M. Mathewson (*Maher & Salisbury*, of counsel), for appellee.

LONG, J. July 16, 1896, the deceased was struck and killed by a train on defendant's road. This action is brought to recover damages on the ground that defendant's servants were guilty of gross negligence in not giving him warning of the approach of the train. It appears that the deceased was walking on the defendant's

track, about 12:30 p. m. of that day, near Lowell station. He lived a little east and south of where he was killed, had lived there about six years, and was familiar with the surroundings. He came upon the track near what was called the "County-Line Road," and had walked west between the rails about 100 rods before he was struck. The track was straight, and he could easily have seen the approaching train if he had looked. He was an able-bodied man, in full possession of all his faculties. The engineer testified that he blew the whistle for the County-Line crossing about 80 rods east of it; that he blew the whistle for the Lowell station as he passed over the County-Line road, which is a trifle over a mile east of the station, and continued to ring the bell; that, soon after crossing the County-Line road, he saw deceased between the rails, walking in a westerly direction; that, when the train was within about 300 feet of him, he blew the alarm whistle, and deceased stepped to the right side of the track, and he supposed he would step off, and for this reason did not slacken the speed of the train; that, when the train was within about 10 rods of deceased, he suddenly stepped to the left, and he (the engineer) immediately shut off steam and applied the air brakes and stopped the train, but that it had gone over deceased before the train could be stopped; that he did not see deceased look towards the approaching train, but did see him step to the right side of the track, and, from this movement, supposed he was aware of its approach, and that he would step off in time to avoid injury. This testimony was fully corroborated by the fireman.

The only witnesses who were examined on the part of the plaintiff in relation to the giving of the signals, and when they were given, were Wheeler Hull, Claude Westbrook, and Albert Bell. Mr. Hull testified that he heard the signals given for the County-Line crossing, which was about 130 rods east of where he then was,—at a barn, doctoring a horse. He saw deceased on the track just east of where he was struck. Witness also heard the

danger signals, and saw the train go by. His back was towards the train, and he was unable to locate where the train was when the alarm whistles were given; and he says he supposed deceased had stepped off the track until the train had stopped. Witness said further: "I did not then hear them give the station signal. I was not paying attention. I did not hear it at all. I do not say that they did not give it." Mr. Westbrook testified that he saw deceased come onto the railroad track at the county line, and he observed him walking down the track towards him; that witness heard the signals given for the County-Line crossing; that he also heard the danger signals, but could not state how far the engine was from deceased when they were given; that he did not hear the station signal; that a portion of the time he was watching Mr. Bell, who was coming across the field. Witness testified further:

"I would be something like 56 or 57 rods west of the King crossing. Looking at the train, I could not tell accurately how far the train was east of Starbard when it gave those signals. * * * I listened when it gave those signals. I went up to the engineer, and told him I thought he made noise enough there. I meant by that I thought the deceased ought to have got off the track. I referred to the alarm whistles."

Mr. Bell testified:

"I did not hear the train whistle after it passed the county line, not until it blew the danger whistle, when it was just a few feet from him. * * * The first thing that attracted our attention was the alarm whistle. The train was then east quite a little way. After hearing the alarm, we just looked up that way, and saw the man. It gave three or four sharp whistles, the same as for stock or anything on the track. * * * So that, not looking, I could not designate the distance between the man and the train at the time the whistles were given."

• This last witness was examined at the coroner's inquest, and on the trial admitted that he there testified that he thought the train was four, five, or six rods from deceased when the alarm whistles were given. He was then asked:

"That was your best judgment at that time?"

"A. Yes, sir.

"Q. And you think so now?"

"A. Yes."

Counsel for defendant, at the close of the testimony, asked the court to direct a verdict in favor of defendant. This was refused, but the court directed the jury that the deceased was a trespasser on the defendant's right of way, and was negligent in his conduct in walking on the track, and not giving heed to the approaching train, and that "only defendant's alleged recklessness, wanton and willful conduct on the part of the engineer, can overcome against the negligence of the deceased." The court then charged the jury:

"If you find that the deceased, Melvin Starbard, lost his life because the defendant's train was wantonly, willfully, or recklessly run upon him, with knowledge that he was ignorant or unconscious of his danger, without the giving of signals or warning until it was too late for him to get to a place of safety, the plaintiff is entitled to recover.

"If you find that the engineer in charge of the train by which Starbard was struck and killed had good reason to believe that Starbard was unconscious of the danger to which he was exposed, and gave no warning signals until it was too late to stop the train before it struck Starbard, and too late for him to escape the danger, then the plaintiff is entitled to recover."

This charge was not warranted, under the undisputed evidence in the case. The testimony of the engineer, corroborated by that of the fireman, is not disputed, upon this record, that the station signal was given at the County-Line crossing; nor is it disputed that, some four, five, or six rods before the deceased was struck, the danger signals were given; so that the deceased had sufficient warning of the approach of the train, but, for some unexplained reason, continued to keep along the track. If he heard the signals, or the approach of the train, it was his duty to move off the track. If he did not hear them, he was negligent in that respect, for it plainly appears that

they were given, not only for the County-Line crossing, but also at the County-Line crossing for the station, and again given as a warning to the deceased. There is no evidence in the case of any gross, willful, or wanton conduct on the part of the engineer. So far as appears from the record, he did all that any prudent person could do to warn the deceased of the approach of the train. He was not called upon to check the speed of the train until he saw that the deceased was giving no attention, and he testifies that, from the movements of deceased on the track, he supposed he meant to step off in time. The engineer had the right, under the circumstances here shown, to believe that the deceased did hear the signals, and would get out of danger. *Frost v. Railroad Co.*, 96 Mich. 470; *Bouwmeester v. Railroad Co.*, 67 Mich. 87; *Lyons v. Railway Co.*, 115 Mich. 114; *Redson v. Railroad Co.*, 120 Mich. 671.

In *Johnson v. Truesdale*, 46 Minn. 345, the court directed a verdict in favor of defendant. It appeared that plaintiff was walking on the railroad track, between the rails, when he was overtaken, struck, and injured by a train going in the same direction on the same track. He did not hear the bell or whistle, although both were sounded as a warning to him when within 150 to 180 feet distant from him, and afterwards as it approached nearer. He was in possession of all his faculties. He was, however, looking at another engine near him on another track, which was making some noise. The court said:

“The case conclusively showed that the plaintiff was both a trespasser and chargeable with contributory negligence, and hence the defendant is not legally responsible unless the conduct of its servants in the management of the train after they discovered his danger was wantonly or willfully negligent. * * * Even if the case shows only want of ordinary care on the part of the defendant’s servants, it would not justify the conclusion that they were intentionally or wantonly regardless of the plaintiff’s safety. All reasonable and proper effort was made to warn him of the approach of the train, which was running at the rate of seven miles an hour. There

was no obstacle to prevent him from getting off the track. The defendant's servants operating the locomotive might presume that he was possessed of the ordinary faculties, and that he would heed the signals, and get off the track in time to escape injury; hence they were not required to attempt to stop the train until it appeared to be probable that he would not do so. *Erickson v. Railroad Co.*, 41 Minn. 500. It appears that, when this did become apparent to the engineer, he used all the means in his power to stop. Even if he erred in his judgment as to the probability that the plaintiff heard the signals, and would step aside before the train should reach him, and hence erred as to the time when he ought to have reversed his engine and applied the brakes, there is nothing to warrant the belief that he acted in reckless disregard of the plaintiff's safety. It is apparent that he tried to warn the plaintiff of the approaching train, and tried to stop the train when he realized the necessity for doing so."

It is just as apparent in the present case that the defendant's engineer gave the warning signals as soon as he apprehended the danger the deceased was in, and that he had before that given the signals which the statute requires. In fact, the plaintiff, by her declaration, alleges that—

"They [the defendant's servants] saw deceased nearly half a mile before the accident. After the engineer knew, or had good reason to know, that deceased was unconscious of the approach of the engine, and did not recognize the peril of his situation *and the warnings given*, he had ample time, and it was his duty, to stop the train before it overtook said Starbard."

The plaintiff therefore did not rest her case upon the claim that no warnings were given in time, but that after such warnings were given, and the engineer saw they were not heeded by the plaintiff's decedent, there was time then to stop the train and prevent the injury. The testimony most certainly does not sustain the claim.

The court should have directed a verdict in favor of defendant. The judgment must be reversed, and a new trial awarded.

The other Justices concurred.

SCHEIBECK v. VAN DERBECK.

1. EVIDENCE—LETTERS AND TELEGRAMS—MATERIALITY.

It is not error to exclude from evidence letters and telegrams which merely tend to prove admitted facts, and do not relate to the vital question in controversy.

2. CONTRACTS — EMPLOYMENT OF BASEBALL PLAYER — AGENCY—ESTOPPEL TO DENY.

Where the manager of a professional baseball team referred a player to the captain of the team, with the statement that the captain was his sole manager, and whatever he did "went," he is bound by a contract for the employment of the player, entered into by the captain on his behalf, whether or not the captain had authority from him to make it.

Error to Wayne; Donovan, J. Submitted October 25, 1899. Decided November 22, 1899.

Assumpsit by Frank Scheibeck against George A. Van Derbeck on a contract of employment. From a judgment for plaintiff, defendant brings error. Affirmed.

George X. M. Collier, for appellant.

Sloman & Groesbeck, for appellee.

HOOKER, J. The plaintiff commenced an action in justice's court to recover an amount alleged to be due him under two alleged contracts for his services as a ball player. His bill of particulars contained two items, viz.:

May 29. Services and labor rendered as per contract with the defendant.....	\$119 28
June 18. Upon express promise of Con Strouthers, captain and manager of Detroit B. B. Club, and agent for the defendant, to pay salary while plaintiff remained physically incapacitated.	170 40
Total.....	<u>\$289 68</u>

The defendant filed with his plea a notice of set-off

amounting to \$76.50. The plaintiff recovered a judgment for \$199.51, and the defendant appealed to the circuit. The record states that, upon the trial at circuit, "judgment was duly entered on verdict for plaintiff, on October 25, 1898," but is silent as to the amount. So, also, is appellant's brief. The appellee's brief states that the judgment at circuit was \$143.11, and was made up of the first item of \$119.28, with interest. He is corroborated in this statement by:

1. A computation.
2. The *præcipe* for execution.
3. The charge of the judge, which says that the plaintiff's claim is \$119, with interest, and that the dispute in the case arises over an alleged payment of \$75.
4. A request on behalf of the plaintiff that the jury must find a verdict for the plaintiff for \$143.11, unless they find that the defendant is entitled to a set-off, and a further request to instruct the jury that there cannot be a recovery upon both items of the plaintiff's bill of particulars.

We are therefore justified in finding that the first item only was allowed, and that the set-off was not allowed.

The item of \$119.28 arises under a written contract, whereby the defendant hired the plaintiff to play ball at a price named, and there is no question but that such sum was earned on May 29th, when the plaintiff was discharged. The set-off is based upon a claim that, at the time the contract was made, plaintiff was under contract with the Washington, D. C., Club, and that both parties to this suit desired his release, which was procured and paid for by the defendant. The defendant asserts that it was agreed that the plaintiff should reimburse him to the amount of \$75, while the plaintiff says that he did so upon condition. On his cross-examination, he testified upon this subject as follows:

"During April I was to get myself in condition to play schedule games with the Detroit Club, which commenced May 1st. The regular schedule games commenced May 1st. While playing a practice game in April, I was first

injured. The first game was played on May 1st in Detroit, with the Toledo Club. I was again injured on that day, and from the 2d of May until the 29th of May I did not play with the Detroit Club. I do not know when Van Derbeck procured my release from the Washington Club. I know Washington still had a claim in April against me. I wanted it off, as I wanted to stay in Detroit. At the time I got the \$100 I told Strouthers and Van Derbeck I was anxious to get the same. When I signed the contract I was still owned by the Washington Club.

"Q. Did you make any proposition to Mr. Van Derbeck to buy your release?

"A. In a way. If you want me to tell it, I will. I met him. I do not know whether in his office or out in front. I said, 'Van, if you can buy my release from the Washington Club, I will give you \$75 or \$100 towards the money you pay for me if I sign;' and he said he would let me know, and that is all there was between him and me. I had a talk with Strouthers. He came up and saw me. After that I never had another talk with Van Derbeck about getting my release from the Washington Club.

"Q. You never had another talk with Van Derbeck? Did you testify as follows in the justice's court:

"'Q. I would like to ask you if you had any talk with Van Derbeck after the time at which this question of \$75 was discussed between you and Mr. Strouthers and the time when you went to receive your pay.

"'A. I do not know anything of it. I believe I had a little talk with him. I told him I would like to play with the club; I would like to stay here; I did not like to go back to Washington, if I was playing good ball. I said to him, if he would buy me, I would give him \$75 towards the money paid to the Washington Club, and I told Van Derbeck that, and also Mr. Strouthers.'

"A. I told Mr. Strouthers—

"Q. Did you so testify in the justice's court?

"A. I had one talk with Van Derbeck.

"Q. Did you so testify in the justice's court?

"A. I testified I had a talk with Van Derbeck regarding my release from the Washington Club, and I made the proposition I have just testified to,—that, if he bought me and paid for me, I would pay \$75 or \$100 towards the money that he paid for me; and then he said he would let me know. I was paid on the 15th of May. Van Derbeck

paid me, and at that time he asked me to deduct the \$75. I told him if he deducted the \$75 I would hold him to his contract with me that Mr. Strouthers had made with me as sole manager at the time. I did not tell him that I didn't want it deducted at the time because I was hard up.

"Q. Let us have what was said on this 15th of May, when you went there to get your pay.

"A. Well, he paid me, and he drew up a check for \$27 and something, and he asked me about the \$75, and I told him I did not think he ought to take it out now. I was under the impression I would get pay as long as I was disabled, which my contract called for under Mr. Strouthers as manager, and that is what I told him. I wanted to use the money.

"Q. What was your talk then with Mr. Strouthers?

"A. Well, Mr. Strouthers came up to the house to see me, when I was laid up with my leg, and he came in, and asked me how I was, and I told him I was in pretty bad shape. He said, 'I have just bought Mr. Nicholson;' and he says, 'I have got a chance to buy you;' and he says, 'How are you feeling?' and I says, 'Pretty bad;' and he says, 'What did the doctor say?' and I said, 'He says I may be able to play in 10 days, and may not be for six weeks;' and he says, 'Are you willing to give this \$75 and get the release?' and I told him I did not see how I could; and he said to 'never mind, old boy, take care of yourself, and you will be paid as long as you are disabled.' I says, 'If that is the case, you can take out the \$75.'

"Q. Now, when you received the money, on the 15th, did you tell Mr. Van Derbeck the conditions under which you were to pay that \$75?

"A. No, sir; I did not see why I should; he had his manager. On the 29th of May, when I received my release, I told Van Derbeck, 'If you take this \$75 out of my salary, I will sue you under that agreement I had with Strouthers.' Van Derbeck wanted me released, and offered me a check for \$40. I wanted what I had actually coming, \$119; he wanted to deduct the \$75.

"Q. And you were the man that got the benefit of this release from the Washington Club, were you not?

"A. Certainly not; I lost a month's salary.

"Q. You got the benefit of your release from the Washington Club?

"A. In what way?

"Q. In that you could contract with another club if you wanted to?

"A. I could not until the season was finished with Van Derbeck.

"Q. You were released on the 29th; after that you could contract with anybody else?

"A. I suppose so; I suppose if a man is out of a job he can go wherever he wants to; I think so.

"Q. So that what you tell the jury is that Mr. Strouthers said we would pay you \$8.52 a day as long as you were disabled,—at that rate?

"A. He would pay me as long as I was disabled. There was nothing said as to the length of time which I might be disabled. If I was disabled all summer, I was under the impression I would get my salary until the end of the season.

"Q. You were to have your salary all this month, if you gave \$75?

"A. If I was not able to play I was to have that salary.

"Q. For how many months?

"A. As long as I was not able to play.

"Q. How long is the season?

"A. Five months.

"Q. So that you would have \$255 a month, for the season, if you were not able to play?

"A. I understood that; sure I did. I was to have all that by paying \$75. Strouthers thought I was going to play in 10 days; so did everybody else; and I hurt myself again. Nobody could tell how long it would last. It might be 10 days, two weeks, or a month. I want my 14 days' pay.

"Q. But you do not want to pay the \$75?

"A. If you want my \$75, I have a right to the rest of it, according to his agreement with me."

Redirect examination:

"Mr. Van Derbeck told me to go to Strouthers.

"Q. Before you made any contract?

"A. Yes, sir; he told me Mr. Strouthers was the sole manager, and whatever he done went. I got able to play again about the 20th or 25th of June. I went with the Toledo Club, which were transferred the same day, and I went with them to Terre Haute. After that I went with the Washington Club, and finished the season with them, up to October 1st."

We are satisfied that this testimony made it necessary

to leave to the jury the question of Strouthers' authority, and the determination of the facts in relation to the talk with Strouthers.

We think, also, that it was proper for the learned circuit judge to limit the jury to a consideration of the \$75 item, and that the case should not be reversed because he mentioned it as the "\$75 payment *alleged* to have been made to a club in Washington," etc.

A number of assignments of error relate to the exclusion of testimony which the defendant's counsel offered, and which, it is said, tended to support the defendant's claim of set-off. Taking them in their order, they were as follows: Exhibit C, a telegram reading:

"Mar. 15th, 1895. CINCINNATI, O., 15.

"To G. A. VAN DERBECK:

"You may sign Scheibeck providing Washington Club gives consent.
B. B. JOHNSON."

For this it is claimed that it shows that the assent of the Washington Club was necessary before the contract could be made. We are not pointed to any testimony which shows who Johnson was, or why such consent was necessary. If there is any proof upon the subject, it is to be found in the testimony of the parties, where they seem to have recognized the desirability—or, possibly, necessity—of a release. This exhibit, however, throws no light upon it, nor does it show that a consent was obtained. Several letters and telegrams were offered showing negotiations in relation to this subject, but they prove no more than the admitted facts, viz., that defendant paid \$300 for the release of the plaintiff and another player by the Washington Club. It was clearly proved that the \$75 was paid, and the charge does not indicate to the contrary. The vital question was whether the defendant had a right to charge it to the plaintiff.

We do not agree with the defendant that the writings show an obligation upon the part of the plaintiff to Washington. The most that could be claimed is that they show such a claim on the part of the Washington Club, which

is no more than unsworn hearsay testimony of the fact that counsel maintains that they prove. Nor do their dates show that plaintiff saw them or knew anything about them.

The defendant was asked to describe the scope or extent of Strouthers' authority, and his duties, and an objection was sustained. Had the case depended upon that, it may be that the defendant might complain; but the plaintiff's case rests upon the statement that the defendant gave him the right to understand that he could contract with Strouthers in relation to the matter. He did not say, "Strouthers was defendant's manager, and therefore I had a right to deal with him," but that "I tried to contract with the defendant, and he referred me to Strouthers, and said, 'Strouthers is my sole manager; whatever he will do will be business with you;'" and, again, "He told me Strouthers was the sole manager, and whatever he done went." This, if true, was binding upon defendant, whether Strouthers was his sole manager or not.

We find no error, and the judgment is affirmed.

The other Justices concurred.

PEOPLE *v.* BUTLER.

CRIMINAL LAW — INFORMATION — AVERMENT OF FORMER CONVICTIONS—OMISSION CURED BY VERDICT—SENTENCE.

3 Comp. Laws 1897, § 11786, provides that, when a person convicted of crime shall have been twice before sentenced in the State to imprisonment at hard labor for not less than one year each time, he shall be sentenced to imprisonment at hard labor for life, or for not less than seven years in addition to the punishment prescribed for his last conviction. Section 11924 provides that in statutory offenses, or any offense for which a statute fixes the punishment, the indictment shall be held sufficient, after verdict, to warrant the punishment pre-

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scribed by the statute, if it describes the offense in the words of the statute. Respondent was convicted of larceny from a dwelling under an information which charged two former convictions in the language of section 11786, and sentence was imposed under the provisions of that statute, the former convictions being admitted by respondent in open court. *Held*, that, if the information was defective in failing to state the times and places of the former convictions (a point not decided), it was good after verdict.

Error to Lenawee; Chester, J. Submitted October 26, 1899. Decided November 22, 1899.

James Butler was convicted of larceny from a dwelling as a third offense, and was sentenced to imprisonment in the state prison at Jackson for 20 years. Affirmed.

Parkinson & Campbell, for appellant.

John E. Bird, Prosecuting Attorney, for the people.

HOOKE, J. The defendant was convicted of larceny from a dwelling in the daytime. The judgment recited that it appeared from the information, verdict, and admissions of the defendant in open court that he had been twice duly convicted by a court in this State, and had been twice sentenced thereon to imprisonment at hard labor in the state prison at Jackson, for a period of not less than one year at each time, by a court in this State, and adjudged that he be imprisoned for the period of 20 years. It is claimed on his behalf that said sentence was excessive, for the reason that the information did not state the times and places of said prior convictions.

Section 11786, 3 Comp. Laws 1897, provides that:

“When any such convict shall have been twice before sentenced to imprisonment at hard labor, for a period of not less than one year at each time, by any court in this State, or in any other of the United States, he shall be sentenced to imprisonment at hard labor for life, or for a term of not less than seven years in addition to the punishment prescribed by law for the offense of which he shall then be convicted.”

The information charged the former convictions in the language of the statute. The record does not show whether the question was raised at circuit or not. In the case of *People v. Buck*, 109 Mich. 687, it was held necessary, under a similar statute, to charge the offense as a second offense, and that there was a previous conviction, and it was suggested that "properly the information should state at least the date and occasion of such conviction." But if we should hold that this information should have alleged these things, the statute (3 Comp. Laws 1897, § 11924) applies. It provides that:

"When the offense charged has been created by any statute, or the punishment of such offense has been declared by any statute, the indictment shall, after verdict, be held sufficient to warrant the punishment prescribed by the statute, if it describe the offense in the words of the statute."

We do not overlook the fact that this statute does not change the rule as to the substantial requisites of an indictment, which are as essential as they were before the statute was passed. The information must inform the accused of the nature of the offense charged. *People v. Marion*, 28 Mich. 255; *Brown v. People*, 29 Mich. 232; *People v. Olmstead*, 30 Mich. 438. But usually an indictment is sufficient if it states the crime, and it should not state the evidence. *Morrissey v. People*, 11 Mich. 330. It is competent for the legislature to provide that an offense may be charged in the language of the statute, provided the elements of the offense are alleged. In this case a requisite is that the defendant has been previously twice sentenced to imprisonment, etc., for one year, by courts of this State or the United States. That is alleged in this information, and, if it is necessary to state the circumstances of such convictions, greater particularity is required than is usually necessary in charging other offenses, and in a measure is stating the evidence, which the defendant, by demanding an examination, could ascertain, if necessary to his defense. The legislature

might dispense with the necessity of such particularity in the first instance, and has done so after verdict. In Massachusetts it was held that it was necessary to charge the fact of a former conviction. See *Tuttle v. Com.*, 2 Gray, 505. That case alludes to a statute providing that it shall be sufficient to allege briefly that such person has been convicted of a violation of the seventh section of a Massachusetts act, and that the same might be amended, as a matter of right, before final judgment. It appears not to have occurred to that court that this statute was invalid, as it drew from it the inference of an intention on the part of the legislature to require an allegation of the fact of former conviction. In the case of *Com. v. Harrington*, 130 Mass. 35, it was held that the failure to allege two previous convictions within a year forbade the imposition of the greater penalty. It was said there that the former convictions should be set forth, and there is a possible, though not a necessary, inference that they should be particularly described. See *Garvey v. Com.*, 8 Gray, 382. In Bish. Stat. Crimes, § 981, it is said that allegation of a former conviction is essential under our constitutions, and this is doubtless true. The essential facts are that the accused had previously been sentenced to imprisonment at hard labor for a period of a year by a court of this State. This information is quite as specific in apprising a defendant of what he is to meet as one that charges the larceny of the horse of John Smith at the county of Wayne or city of New York. It used to be required that the subject of larceny should be carefully described, and an allegation that one stole money was not good until made so by statute. It was urged that this statute deprived defendants of a constitutional right, but this court held otherwise. *Brown v. People*, 29 Mich. 232. The charge of murder was materially abbreviated by a statute which practically eliminated all specific description of the circumstances, yet it was held valid. *Sneed v. People*, 38 Mich. 248. In *Rice v. People*, 15 Mich. 9, a charge of assault with intent to murder in the

language of the statute was held good. In *Durand v. People*, 47 Mich. 332, it was held that, while a more full and complete description of an assault with intent to rob might be essential, yet an omission of descriptive averments could not prejudice the accused, and was cured by the statute after verdict. See, also, *People v. Taylor*, 96 Mich. 576 (21 L. R. A. 287).

We are of the opinion that, if the information was defective (which we do not determine), it is good after verdict. The conviction is affirmed.

The other Justices concurred.

122	39
e135	*290
122	39
145	*25

AUDITOR GENERAL v. PATTERSON.

1. TAXATION—PURCHASE OF STATE LANDS—SETTING ASIDE SALE—REFUNDING MONEY PAID FOR SUBSEQUENT TAXES.

Under the provision of the tax law that, where a sale is set aside, "the amount paid at the time of the sale" shall be refunded to the purchaser (Act No. 154, Pub. Acts 1895, § 73), a purchaser of state tax land is entitled, on the original sale's being set aside, to have returned to him, not only the amount paid for the State's title, but also the amount of the subsequent taxes paid by him as a condition to the purchase, as required by section 84 of the law (Act No. 206, Pub. Acts 1893); and it is immaterial that the sale had in fact been declared void at the time of his purchase.

2. SAME—LIEN OF STATE—ENFORCEMENT—CHARGES TO COUNTY.

The lien of the State is not lost as to subsequent taxes so returned, but may be enforced in the usual manner; the further provision of section 73, that the portion of the amount refunded that was originally assessed for county and township purposes shall be charged back to the county, applying only to the taxes for which the sale was made, and not to the subsequent taxes.

Appeal from Saginaw; Snow, J. Submitted October 6, 1899. Decided November 22, 1899.

Petition by Roscoe D. Dix, auditor general, for the sale of lands delinquent for taxes: On objections filed by Egbert H. Patterson. From a decree for petitioner, defendant appeals. Affirmed.

Robert Holland, Assistant Prosecuting Attorney, for petitioner.

G. W. Davis, for defendant.

LONG, J. The lands in question were returned delinquent for the taxes of 1894, 1895, and 1896, and were included in the petition of the auditor general for the year 1896 for the taxes levied in the year 1894, and at the sale in December, 1896, were bid in by the State. Subsequently the decree of sale was vacated, the bid canceled, and the taxes of 1894 decreed to be void. On December 6, 1897, Launt Thompson applied to the auditor general to purchase the State bid on this description of land, and on February 18, 1898, paid the taxes on the land for the years 1894, 1895, and 1896. A deed was issued to him under the State bid made for the tax of 1894, the auditor general at that time not having in mind that the decree for that sale had been set aside. This deed was issued February 21, 1898. On March 7, 1898, respondent, Patterson, wrote the auditor general, asking what had been done about the taxes of 1895 and 1896 on the lands, and received the following reply, dated March 12, 1898: "Replying to yours of the 7th inst., the taxes of 1895 and 1896 * * * were paid February 18, 1898." Thereafter, when the matter of the decree vacating the sale for the taxes of 1894 came to the attention of the auditor general, he canceled the sale, and refunded the money paid by Thompson on the State bid, and also the money paid by him for the taxes of 1895 and 1896. The auditor general then filed his petition for the sale of the lands for the taxes delinquent for the year 1895, which had been previously repaid to Thompson, amounting to \$77.53. The respondent, having purchased the land, made and filed his objections to the petition, and

claimed that the auditor general was without jurisdiction to include said taxes in his petition, and that the court had no jurisdiction to decree said sum to be a lien on said lands, or to order a sale thereof in satisfaction of the taxes, as said taxes had been paid by Thompson, to whom the land had been sold and deeded. The court below on that hearing overruled the objections, and entered a decree of sale, adjudging that the tax of 1895 remained a lien on the land. From this decree the respondent appeals.

It is claimed by the respondent that by the provisions of section 84, Act No. 206, Pub. Acts 1893, Thompson was compelled to pay the taxes of 1895 and 1896 before he would be entitled to take the State bid for the tax of 1894, and that by such payment the lien of the State became extinguished, and could not be revived by the auditor general; that the payment of the taxes of 1895 and 1896 by Mr. Thompson was voluntary, and made after the title and taxes of 1894 had been vacated and canceled, and he was not entitled to have the same refunded; that voluntary payments cannot be recovered back,—citing cases to that effect.

As a general rule, the proposition is well sustained by the authorities; but provision is made by the tax law to meet such cases. Section 73 of Act No. 206, Pub. Acts 1893, as amended by Act No. 154, Pub. Acts 1895, provides:

“If a sale made under this act is set aside by any court, the auditor general shall refund to the purchaser the amount paid at the time of the sale, with interest thereon at the rate of eight per cent. per annum from the time of purchase to the time when said sale is set aside, out of the general fund of the State, and charge back to the county the portion of the same originally assessed for county and township taxes, and the interest thereon.”

We think this section means, by the words “the amount paid at the time of the sale,” the whole amount; not only the amount paid for the State bid, but also the amount paid for the succeeding taxes. Before the party purchasing

is entitled to his deed, he is compelled to pay all subsequent taxes which are a lien upon the land. We have repeatedly so held. The auditor general was, therefore, authorized by the section above quoted to refund to Mr. Thompson the amount paid by him for the taxes of 1895 and 1896. It does not follow that the lien of the State upon the lands for the taxes of 1895 and 1896 was discharged by this transaction. It is true that the payment of these taxes by Mr. Thompson would have discharged the lien but for the provisions of the statute. It was undoubtedly the intent of the legislature by this statute to provide for the contingency which arises here. Sales were frequently set aside by the courts for various reasons, even after the State had sold its bid, the payments having been made in good faith by the purchasers; and the tax law was evidently framed to protect such purchasers by providing that the amount paid at the time of the sale should be refunded to them by the auditor general. This leaves the taxes for the subsequent years which have been paid to stand as a lien upon the land, the same as though they had never been paid.

But counsel contends that the last provision of the section provides another remedy, and that it cannot be said that the lien remains; that is, that these taxes must be charged back to the county, so far as they were assessed for township and county purposes. This provision evidently has reference only to that part of the taxes that is decreed void by the court. Such taxes cannot be charged back upon the land, so that the State, county, and township must each lose its share of those taxes. But the taxes of the subsequent years are not void. There is nothing in the act by which it can be said that the lien for those years becomes extinguished.

The case, cited by counsel, of *Iowa Railroad Land Co. v. Guthrie*, 53 Iowa, 383, is not in point. In that case it did not appear that there was any statute of that State authorizing the repayment of the subsequent taxes to the purchaser, and the court held that, after such taxes

were paid, even by a stranger, the treasurer, after having received the payment of the taxes, could not treat the land as delinquent, and the subsequent sale was therefore void. The court quotes from section 870 of the Code of that State, which provides that the board of supervisors shall direct the treasurer to refund to the taxpayer any tax or any portion of a tax found to have been erroneously or illegally exacted or paid, and then says: "The tax in this case was not 'erroneously or illegally exacted or paid.' It was a legal tax, lawfully paid and lawfully received by the treasurer." The same is true of the Pennsylvania and Illinois cases cited.¹

We think the court below very properly entered a decree for the sale of these lands. That decree is affirmed, with costs.

The other Justices concurred.

HOWEY v. FISHER.

122	43
156	*295

1. CONTRIBUTORY NEGLIGENCE—FORMER APPEAL—RES JUDICATA.

A holding, upon appeal of an action for personal injuries, that the circuit judge was in error in directing a verdict for defendant for the reason stated by him,—that there was no evidence that defendant was negligent,—does not establish plaintiff's right to go to the jury upon a subsequent trial, wherein she is claimed to have been guilty of contributory negligence, a point not raised on the original appeal.

2. SAME—ICY SIDEWALK—KNOWLEDGE OF DANGER.

Where plaintiff, instead of taking advantage of paths to and from the street which would enable pedestrians to avoid an icy place in the sidewalk, which plaintiff knew to be dangerous, attempted, though with caution, to walk across the ice, she was guilty of contributory negligence, precluding a recovery for injuries sustained in falling upon the ice.

¹ *Montgomery v. Meredith*, 17 Pa. St. 42; *Morrison v. Kelly*, 22 Ill. 610; *Mason v. City of Chicago*, 48 Ill. 420.

Error to Wayne; Donovan, J. Submitted May 10, 1899. Decided December 2, 1899.

Case by Margaret J. A. Howey against Maxwell M. Fisher for personal injuries. From a judgment for plaintiff, defendant brings error. Reversed.

Elliott G. Stevenson and *Robert F. Eldredge*, for appellant.

Frank T. Lodge, for appellee.

MONTGOMERY, J. Plaintiff received injuries from stepping on an icy sidewalk. She brings this action against the defendant, who is the owner of a lot abutting upon the street, claiming that the eaves-trough upon his house situated on this lot had been for a considerable time out of repair, and that the formation of ice which caused the injury was the result of water carried from defendant's premises to the walk by reason of such defective eaves-trough. The case has once been before the court, and is found reported at 111 Mich. 422. It is contended by plaintiff's counsel that some of the questions raised by defendant are *res judicata* by the former decision, and it is said that it was held that the case was a proper one for the jury. A reference to the opinion of Mr. Justice MOORE on the former hearing will show that it was held — *First*, that, in taking a case from a jury, the circuit judge should give his reasons therefor (citing *Demill v. Moffat*, 45 Mich. 410); and, *second*, that the case should not have been withdrawn from the jury for the reason given by the trial judge, viz., that there was no evidence of want of repair of the eaves-trough or conductor. The holding related to the question of defendant's negligence on the record as it then stood, and does not preclude the defendant from contending on this record that the plaintiff was guilty of contributory negligence, or that the defendant was neither in possession of the premises nor under obligations to keep them in repair.

On the last trial the plaintiff testified that she went over the spot at about 5 o'clock that same evening, when it was not quite dark, and that the accident happened between 5 and 6; that she knew this place was icy, and had observed it when going into the house, and had taken particular caution.

"Q. Did you regard that as a dangerous place?

"A. Yes, sir.

"Q. Why?

"A. Because the ice was there.

"Q. How long had it been there?

"A. Almost all the time I had been on Duffield street.

"Q. You went by there frequently?

"A. Yes, sir.

"Q. For how long before you got hurt was that ice there, in such a condition you thought it dangerous?

"A. I could not say.

"Q. Was it there since Christmas?

"A. Yes, sir. * * *

"Q. You say you were walking carefully when you went by there?

"A. Yes, sir.

"Q. Tell us how you walk when you walk carefully; what you did different from any ordinary walk.

"A. Well, I was watching the ice, and I was taking particular pains to get across it, and knew it was there, and not a very easy way to get around it, so I walked along.

"Q. No difficulty in going right out in the street from the door, was there?

"A. I do not know. I supposed sidewalks were supposed to be in repair, so that people could walk along them. The street down from the door was paved with cobblestones, and slanted down, and one was as liable to fall there. I did not notice that night, particularly, that there was ice there. Naturally there would be.

"Q. Was not that used constantly back and forward there beside that door,—milkmen and other folks going in and out?

"A. I presume they did.

"Q. No difficulty in going in and out there?

"A. Considerable snow.

"Q. No difficulty in going out where those stones were?

"A. No, sir; it was cleaned off.

"Q. Any difficulty in going out there where the livery barn was?

"A. No, sir. * * *

"Q. Mr. Stevenson was asking you about the care you exercised in walking along. Just state what degree of care, if any, you did exercise in walking along that night.

"A. Well, I was going along the street, and I knew the ice was there, and I took care; and, had I known I was going to fall—

"*Mr. Stevenson:* Just tell what you were doing.

"A. I was taking care,—walking along and watching the ice, and taking care not to fall on it. It was a cement sidewalk,—artificial stone."

On re-cross-examination witness testified:

"Q. Do you mean this place where you fell was so slippery and icy you could not walk across it, walking carefully, without falling?

"A. Yes, sir. * * *

"Q. What do you mean by 'walking carefully'?

"A. I was watching the ice, and taking particular pains not to fall.

"Q. Had been that way all winter?

"A. Yes, sir; of course, the ice cleaned off lots of times.

"Q. You knew it was there when you went over, and knew it was there when you came back?

"A. Yes, sir."

It appeared from other testimony in this case that there was a walk to the street leading from the side door of the house, and that there was a driveway from the street to the barn. One witness, called by plaintiff, testified, "If any one wanted to avoid the ice, they could step out off the walk to the street, go around the icy place, and back by the stable door to the brick barn." Plaintiff's counsel calls attention to the statements of this witness to the effect that sleighs and carriages run out of the barn, and, standing there, would prevent one from stepping off the sidewalk into the street. But this witness testified, as to the location of the rigs, that "they stood between the walk from the side door to the curb and the cobblestone way from the barn."

. It is apparent from this testimony that the plaintiff knew of the risk of passing over this icy way, and assumed the risk of doing so, although there was a way to avoid this danger by stepping out into the street for a short distance. The precise danger was before her, and she had it in mind at the time. The case is quite different from those in which it has been held that possessing knowledge of a defect in a way will not preclude recovery, where it appears that the plaintiff was, notwithstanding, in the exercise of due care. *Graves v. City of Battle Creek*, 95 Mich. 266 (19 L. R. A. 641, 35 Am. St. Rep. 561); *Lowell v. Township of Watertown*, 58 Mich. 568; and cases of this class. In neither of these cases was the plaintiff, at the very moment of the accident, aware that, at the very place where he then was, he was encountering the danger or taking the risk of injury. In the present case there was nothing to distract plaintiff's attention. She could and did see the danger. She could have avoided it by going around the icy place. The case of *Black v. City of Manistee*, 107 Mich. 60, cannot be distinguished from this, in principle. See, also, *Grandorf v. Railway Co.*, 113 Mich. 496; *Cosner v. City of Centerville*, 90 Iowa, 33; *Ray v. City of Poplar Bluff*, 70 Mo. App. 252.

We think that a verdict should have been directed for the defendant, and, inasmuch as this conclusion is based on plaintiff's testimony, the judgment will be reversed, and no new trial ordered.

The other Justices concurred.

122	48
s80w	1015
180	118
e180	*119
180	*122

MOORE v. UNIVERSAL ELEVATOR CO.¹

122	48
d135	7 44
122	48
f143	*422
122	48
150	'93

1. CORPORATIONS—MORTGAGE TO STOCKHOLDER—RIGHTS OF BONUS SUBSCRIBERS—EVIDENCE.

In a controversy between subscribers to a bonus fund for a corporation and a stockholder to whom the corporate property has been deeded to secure him for advances, the conditions of a private arrangement under which the mortgagee became a stockholder are immaterial.

2. SAME—CAPITAL STOCK—GOOD FAITH OF SUBSCRIPTIONS.

Subscribers to a bonus fund for a corporation have a right to assume that the subscriptions to its capital stock were made in good faith, and that they will be paid in money or in money's worth.

3. SAME—OVER-VALUATION OF PROPERTY—NEGLIGENCE OF DIRECTOR.

Where a director in a corporation, who, though not a *bona fide* stockholder, is held out as such, neglects to examine into the value of property turned over to it in payment of stock subscriptions, and such property proves to be worthless, as between him and those who subscribed to a bonus on the faith of his connection with the corporation, he must be the loser, and he cannot defend upon the ground that he was not an actual stockholder.

4. SAME—MORTGAGE DEED.

A deed from a corporation, absolute on its face, but given to secure advances made by a director, is a mortgage, and the corporation may convey the property in payment of its debts, subject to such mortgage, if valid.

5. SAME—CLAIMS OF BONUS SUBSCRIBERS—BREACH OF CONTRACT.

Where corporators, having agreed, in consideration of a bonus subscription, that a stated amount of the capital stock should be immediately subscribed, that a building should be erected and equipped for manufacturing, and that the business should be in active operation within a stated time, procured no *bona fide* subscriptions to the capital stock, but, in lieu thereof, turned in property at a grossly excessive valuation, equipped

¹ Rehearing denied April 3, 1900.

the building erected by them with machinery the title to which was retained in the vendors, and failed entirely to put the business into active operation, they were not justified in resisting the claims of the bonus subscribers upon the ground that their subscriptions were not paid in full.

6. SAME—FAILURE OF BUSINESS—STATUTES.

The fact that a corporation just organized secures a director for advances by a deed to its property, and also gives a deed to the same premises to secure the bonus givers, before it has fairly commenced the business for which it was organized, does not constitute the failure in business contemplated by Act No. 144, Pub. Acts 1895, § 6, providing that, in case of the failure of a corporation, bonus givers shall become creditors to the amount contributed.

7. SAME—PRIORITY OF LIENS—FRAUD.

The lien of a director of a corporation under a mortgage given by it to secure him for advances will be held inferior to that of bonus givers, claiming under a trust deed of the same property, where the bonus subscriptions were induced by fraudulent representations concerning the capital stock, for which representations the director, even if ignorant of the fraud, was, under the circumstances of the case, responsible.

8. SAME—REMEDY—EQUITY JURISDICTION.

It is not necessary for a defrauded subscriber to a bonus fund, having possession of the corporation's property under a deed executed to secure him, to exhaust his claim against the corporation by suit, judgment, and execution returned *nulla bona*, where he is a party defendant to a suit by a director to foreclose an alleged prior lien, all parties interested being before the court.

Appeal from Wayne; Daboll, J., presiding. Submitted October 3, 1899. Decided December 2, 1899.

Bill by Charles W. Moore against the Universal Elevator Company, Frank E. and James N. Schoonmaker, William Livingstone, Jr., and others, to determine the priority of liens. From the decree rendered, the above-named defendants appeal. Reversed.

In the summer of 1895 the defendants Frank and James Schoonmaker and Hultgren were copartners, doing busi-

ness under the firm name of Schoonmaker Bros. & Co. Their business was that of selling engines and elevators and general lines of machines. They owned no property except some interests in certain elevator patents. They sold machinery for other parties, chiefly, if not wholly, as agents for the Otto Gas-Engine Works and the Morse-Williams Elevator Company. None of the partners ~~were~~^{was} of any financial responsibility. In July of that year they conceived the scheme of organizing a corporation for the manufacture of elevators under the interests in the patents which they held. They employed one Arthur D. Colgrove to promote the scheme. Colgrove knew complainant, Moore, to whom he applied for assistance. Defendant Livingstone and others owned land in North Detroit, where it was proposed to locate the works. The defendant Livingstone was applied to to donate land, and he, as well as other landowners there, was asked to donate money for the erection of a plant. Moore finally consented to assist in the organization of the company, and was the only man of financial responsibility connected with it, except Stanton and Brotherton, who claim to have become stockholders on the same conditions and representations as did Mr. Moore. Early in September, Mr. Colgrove presented to Mr. Moore an agreement for his signature, between him, as trustee, "and the undersigned, of the county of Wayne." The agreement had no signatures, but the undersigned were to be those who should afterwards subscribe to the bonus fund. The agreement reads as follows:

"Whereas, it is contemplated on the part of the said Charles W. Moore, trustee, to organize and establish a stock company in the sum of one hundred thousand dollars capital stock, for the purpose of establishing a factory for the manufacture and sale of elevators and all business incidental therewith;

"And whereas, it is understood that the said factory shall employ at least seventy-five workmen within ninety days after the said factory shall be completed and in operation, and will employ one hundred workmen within one year after the erection and completion of said factory;

"And whereas, the undersigned are solicitous and desirous that said factory be located on the acre and a half of land on the southeast corner of a certain forty acres of land owned by William Livingstone, Jr., and described as the west half of the east half of the northwest quarter of section nine, in the township of Hamtramck, in the county of Wayne and State of Michigan, said one acre and a half of land to be taken off the southeast quarter of said forty acres, and adjoining the railroad station at the village of North Detroit;

"And whereas, the undersigned are desirous that the said factory shall be located on the premises hereinbefore mentioned, for the reason that they are property owners and interested in the surrounding territory to said proposed site:

"Now, therefore, it is agreed between the undersigned, with Charles W. Moore, as trustee, that the said undersigned parties agree to donate the property hereinbefore mentioned as the site for said proposed factory to the said Charles W. Moore, trustee, and such other parties as shall be connected with him in the organization of said proposed stock company, and also to donate the amount set opposite their respective names, to be paid in installments, as hereinafter mentioned, the total amount of said subscriptions to equal the sum of fifteen thousand dollars.

"And the said undersigned agree to pay the sums set opposite their respective names as follows: Twenty-five per cent. of each subscription to be paid when the foundation in said factory is laid, and an additional thirty per cent. when said factory shall be roofed and inclosed, and an additional thirty per cent. when said factory shall be completed, and the balance of fifteen per cent. when said factory is in operation.

"And it is further agreed upon the part of the said Charles W. Moore, trustee, that the said company shall be organized and work shall be begun on said factory within ten days after said site is furnished to him and his associates, and the total amount of fifteen thousand dollars in addition thereto is subscribed.

"And it is further agreed by the said Charles W. Moore, trustee, that, before any of the said subscription shall be paid as aforesaid, he will furnish to the undersigned subscribers hereto a good and sufficient bond in the sum of twenty thousand dollars, conditioned for the carrying out of said agreement, and upon condition, further,

that said factory will be kept and remain in operation for the period of five years or more.

"And it is further understood and agreed that seventy-five thousand dollars of said proposed capital stock shall be subscribed within ten days from the time said bonus is subscribed.

"And this agreement faithfully to be kept and performed the parties hereto have hereunto set their hands and seals."

Moore signed the agreement, which was afterwards signed by defendant Livingstone for \$2,000, and several others, the subscriptions amounting in all to \$8,500. No further subscriptions could be obtained, and, at a meeting afterwards held, the organizers of the company agreed to accept the amount then subscribed, and proceed with the work. On October 11, 1895, the Universal Elevator Company was organized, with \$100,000 capital. The corporators, and the number of shares held by them, as shown by the articles of association, were as follows:

Name.	Shares.
Charles W. Moore.....	2,500
Marvin M. Stanton	1,000
Wilbur Brotherton.....	675
James N. Schoonmaker.....	750
Frank E. Schoonmaker, trustee.....	700
Frank E. Schoonmaker.....	700

These articles were immediately filed in the office of the county clerk of Wayne county, and a few weeks afterwards in the office of the secretary of state. Immediately after the execution of the articles of association, and on the same date, a meeting of stockholders was held, and a board of directors elected, consisting of Moore, Stanton, Brotherton, and the two Schoonmakers. Moore was elected president. At the time of the organization, the following proposition from Schoonmaker Bros. & Co. was presented, and read by the secretary, as appears from the record:

"To the UNIVERSAL ELEVATOR CO., Detroit, Mich.

"*Gentlemen:* We, the undersigned, do hereby agree

to sell, transfer, and assign to the Universal Elevator Company our entire interest in all elevator patents, also our interest as agents for the Otto Gas and Gasoline Engines, also factory which we propose to erect, according to the plans submitted, and all adjoining property connected therewith, and our entire interest incidental with mechanical engineering, for a consideration according to the following estimated values:

Elevator patents.....	\$27,000
Business of the Otto Gas-Engine Co.....	10,000
Factory and property.....	15,500
Business incidental with mechanical engineering..	10,750
Total.....	\$63,250

“For the value of our business and properties we hereby agree to accept \$63,250.00 worth of paid stock in the Universal Elevator Company.”

This proposition was accepted, and a resolution adopted to carry it out, directing the officers of the corporation to issue to Schoonmaker Bros. & Co. \$63,250 of paid-up stock upon receipt of assignment of their business as in such proposition specified. On the same day a certificate for 2,500 shares, the par value of which was \$10, was issued to Mr. Moore. On the reverse side of the certificate was an assignment by Moore to Schoonmaker Bros. & Co. of the capital stock named in the certificate. This assignment recited that he (Moore) had bargained, sold, assigned, and transferred the stock to Schoonmaker Bros. & Co. It also contained the following:

“I do hereby constitute and appoint J. N. Schoonmaker my true and lawful attorney irrevocable, for me and in my name and stead, but to my use, to sell, assign, transfer, and set over all or any part of the said stock, and for that purpose to make and execute all necessary acts of assignment and transfer, and one or more persons to substitute with like full power.”

All the other original stockholders made a like assignment of their certificates to Schoonmaker Bros. & Co. On the same day a certificate was issued to Schoonmaker Bros. & Co. to the effect that they “are the owners of

6,325 shares of the capital stock of the Universal Elevator Company." Schoonmaker Bros. & Co. on the same day indorsed upon the reverse side of this certificate that they had bargained, sold, assigned, and transferred to the following parties shares of the above stock as follows:

Frank E. Schoonmaker.....	1,750
James N. Schoonmaker.....	1,750
William H. Hultgren.....	1,750
Charles W. Moore.....	500
Wilbur Brotherton.....	25
Marvin M. Stanton.....	25
William R. Johnston.....	25
Arthur D. Colgrove.....	500

After this, Moore purchased 500 shares of the stock for \$100 from Hultgren. One thousand shares of the stock then and still do stand in the name of Mr. Moore. Not a dollar upon the capital stock was ever paid in in cash. No stock was ever sold, aside from that represented by the \$63,250, as above set forth. There is no reliable evidence that the interests held by Schoonmaker Bros. & Co. in these patents were of real value. Moore made no investigation into the matter, but testified that afterwards he found them to be of very little value. The \$10,000 put in as the business of the Otto Gas-Engine Company was nothing more than an agency held by Schoonmaker Bros. & Co., revocable at any time, and evidently was of no real value. The item of \$15,500, called "factory and property," was represented by nothing except the promises as contained in the above agreement. The land had not been deeded, nor the bonus subscriptions paid. The item of \$10,750, put in as "business incidental with mechanical engineering," had no tangible value, and was a valueless asset. Work was soon after commenced upon the building, and the building erected. Mr. Livingstone deeded the land to the company. Subscriptions to the bonus fund were paid in to the amount of about \$4,000. On the 15th day of October, 1895, the elevator company executed a bond to the bonus subscribers in the sum of

\$20,000, conditioned for the faithful performance of the agreement above recited. This was not such a bond as the agreement provided for, but nine of the subscribers indorsed upon it the following: "So far as I am concerned, I do not care to require any further assurance than the agrément and within bond." The money paid by these subscribers was used in the construction of the building, and as well other moneys advanced by Mr. Moore. The company could sell no stock, and debts were incurred which required payment. Mr. Moore, at the earnest solicitation of Mr. Schoonmaker, who was the general manager of the corporation, advanced money from time to time, and indorsed notes which he was compelled to pay, the amount of such indebtedness finally being \$8,699.27.

On May 9, 1896, a resolution was adopted by the directors authorizing the execution of a note and mortgage for \$6,000 for the purpose of raising necessary funds until stock could be sold. On June 3d this was rescinded, and the officers authorized and instructed the secretary to execute to Mr. Moore a warranty deed of the factory building and land to secure him for the money he had already raised for the company by indorsing their notes, and such further amount as he might be able to raise for them, and such accounts as he had guaranteed. A deed was executed, a straight warranty in form, but was not recorded, lest it should injure the credit of the company. On August 11th—the time appointed by the by-laws for a regular meeting—no quorum of the directors appeared, and an adjournment was had to the following day at 5 o'clock. Mr. Moore was at that time ill. Meanwhile Mr. Johnston had informed Mr. Moore of the meeting and of the adjournment, and Mr. Moore requested him to be present to see what was done. A quorum was obtained on the following day, and a resolution passed reciting that Mr. Moore had not made the advances which were to be made by him under the terms of the resolution of June 3d; that the parties donating the property and money de-

manded the return of the same; that the company was unable to perform and fulfill the conditions; that said company was indebted to the Otto Gas-Engine Company in the sum of \$1,853.19; and authorizing a deed of the property to Mr. Livingstone to secure such indebtedness. The resolution also provided for the transfer of the property to another company, if one should be organized which should assume and pay the indebtedness of the Otto Gas-Engine Company, and should issue and deliver to Mr. Livingstone shares of its capital stock, fully paid and nonassessable, equal in value and amount to the property and money donated to the elevator company, in which event said Livingstone was to convey the property to the newly-organized company. Mr. Johnston immediately notified Mr. Moore of the action of the directors. Thereupon he hastened to the office of the register of deeds, and placed his deed upon record. On the following morning the deed of Mr. Livingstone was recorded, and one Thomas went and took possession of the building as the agent of Livingstone. Thereupon complainant filed this bill praying that his lien be declared a valid one, superior to that of the defendant Livingstone; that the property be sold, and applied upon the payment of the debts of said corporation, in accordance with the just rights of creditors; that the defendants be enjoined from interfering with said property; and for the appointment of a receiver. Mr. Moore, from the organization of the company down to the 12th of August, 1896, continued to act as the president and a director of the company, had attended the meetings of the board of directors, and his office was the office of the company.

Proofs were taken in open court. Complainant insists that he had no interest in the corporation, and that he went into it, as he himself expresses it, "only to assist these young men to get a business." He also claims that he told Mr. Livingstone that he had no interest in the concern. It is insisted by the defendants that they were ignorant of the relations existing between Mr. Moore and

the other corporators; that they had a right to rely upon him, the only man financially responsible, as a *bona fide* stockholder; that the organization was a fraud in law and in fact; and that their rights are superior to those of Mr. Moore. The court declined to pass upon the merits of the controversy, saying:

"I do not think that the question of the rights of the parties who have given money as a bonus to secure the shops at the place located can be litigated in this suit, and that the deed of Mr. Moore, while taken as stated, and for security, cannot, in this cause, be declared valid against the rights of those who paid the bonus."

He held that the only way the question could be reached was through the court, under the direction of a receiver. A decree was subsequently entered dismissing the bill of complaint as to all the defendants except the elevator company, and the cross-bill of the defendant Livingstone, and declaring that the deed of complainant should have precedence as a mortgage lien from the date of recording the same.

S. S. Babcock, for complainant.

Brennan, Donnelly & Van De Mark (Selling & Hatch, of counsel), for appellants.

GRANT, C. J. (*after stating the facts*). 1. A large part of the record is taken up with testimony relative to the agreement between complainant and Schoonmaker Bros. & Co. relative to the conditions under which complainant became a stockholder in the corporation. It is immaterial what those private arrangements were. Upon this point the testimony is in sharp conflict. It is not necessary to determine what rights Mr. Moore has against his co-corporators and the defendant corporation. That controversy concerns them alone, and is not before us. The controversy now is between Mr. Moore and the bonus givers, and the sole question is, What are the rights of Mr. Moore, under his mortgage deed, as against those of the

defendant Livingstone, representing himself and his co-subscribers to the bonus fund?

2. It is essential to keep in mind a few facts in addition to those above stated :

(a) The organization of this corporation was a fraud in law, if not in fact. As to the Schoonmakers and Hultgren, it was a fraud in fact. The amount of property which they conveyed to the company, for which they received paid-up stock to the amount of over \$63,000, was not worth any such sum. It was a gross and fraudulent over-valuation, and known by them at the time to be such.

(b) The bonus subscribers had no knowledge or notice of the fraudulent character of the organization. They relied upon Moore's connection with the corporation as a *bona fide* one. One of them, before subscribing, caused the articles of association, as filed in the county clerk's office, to be examined. We are not unmindful of the testimony of Mr. Moore that some time in 1896, prior to the execution of the deed by Livingstone to the corporation, he told Mr. Livingstone that he had no interest in the business. Moore at that time was a large creditor of the corporation. Mr. Schoonmaker had informed him that Mr. Livingstone refused to give the deed. Moore went to see Mr. Livingstone, and his version of the conversation is as follows :

"He refused to give the deed at first. I then said to him: 'Mr. Livingstone, I have no interest in their business at all whatever. I have not a piece of land within five miles of it; and if you gentlemen who own the land out there are not going to take any interest in the matter, I am going to get out, and I will go down to the office, and resign, this morning.'"

Just when this conversation took place does not appear, but it was evidently some time in the early part of 1896. According to Mr. Livingstone's version of this conversation, nothing was said to indicate to him that Mr. Moore was not a good-faith stockholder, and interested in the concern. Mr. Moore certainly was interested in getting

the deed from Livingstone to the corporation, and it was not very long after that the mortgage was made to him to secure his debt.

(c) Defendant Livingstone has contributed \$1,700 in cash, and an acre and a half of land, worth at the time about \$2,000.

(d) Moore, by his act in subscribing for the stock, in being a director and president, held himself out to the public and to creditors as a *bona fide* stockholder, and as liable for the amount of stock subscribed by him.

3. Moore's subscription contract was absolute upon its face, and, as between him and creditors who were uninformed of the situation, his liability thereunder cannot be changed by other contemporaneous agreements. Creditors are entitled to the full benefit of the stockholder's contract as he has made and published it in subscribing, executing, and filing his subscription to the stock of the corporation. 1 Cook, Stock, Stockh. & Corp. Law, §§ 137, 138; *Williams v. Benet*, 34 S. C. 112; *Downie v. White*, 12 Wis. 176 (78 Am. Dec. 731). Mr. Livingstone and the other bonus givers relied, as they had a right to, upon the agreement which he signed as trustee, and upon his membership in the corporation. His subscription was a trust fund, and those who dealt with the corporation with knowledge that he was a stockholder had a right to rely upon that fund as a *bona fide* one. As against them, he cannot defend by setting up that he became a mere accommodation, and not an actual, stockholder. As a director he became a trustee for the creditors, and no declaration of trust was necessary; but by his trust agreement he agreed with the bonus givers that \$75,000 of the \$100,000 of capital stock should be subscribed within 10 days from the time the bonus was subscribed. This was to be a *bona fide*, and not a mere paper, subscription. It was not contemplated that the building was to be built, machinery purchased, and a full plant erected with the money of the bonus givers, but that stockholders were to be furnished who would contribute to the necessary funds

for that purpose. This was not done. Not a share of stock was subscribed or sold aside from that issued to the original subscribers as fully paid. Efforts were made to get others interested, and to sell them some of the stock. These efforts were ineffectual, and probably for the very good reason that no prudent man would invest in such an enterprise without an examination, and an examination would disclose to him its fraudulent character. There were in fact no *bona fide* subscriptions.

4. It is urged by complainant that a *bona fide* stockholder may become a *bona fide* creditor of a corporation. This is well established. *Sargent v. Webster*, 13 Metc. (Mass.) 497 (46 Am. Dec. 743); 1 Cook, Stock, Stockh. & Corp. Law, § 11. And he may secure his claim in the same manner as any other creditor. If complainant stood, in this litigation, as such a stockholder, he would be a secured creditor, whose security the law would protect. But he does not stand before the court as such a stockholder in his dealings with the bonus givers. As trustee under his agreement, and as a director, it became his duty to examine into the character and value of the property proposed to be turned over by Schoonmaker Bros. & Co., to determine its fair value, and to see that it was turned over to the company at such value. Instead, he made not even an inquiry, and for the reason, as he states, that he did not consider himself actually concerned in the corporation, but only consented to become a stockholder and director and president to accommodate his friends. An inquiry which he did afterwards make disclosed to him the worthlessness of most of the property. We need not enter into the question of the good faith of Mr. Moore in the transaction. If he trusted the Schoonmakers and Hultgren, believing they were honest and would do no wrong, he, and not those who trusted the corporation on the faith of Mr. Moore's open connection with it, must suffer. As between him and those dealing with the corporation in ignorance of his real connection with it, under his theory he cannot defend upon the ground that he

was a nominal party. He does not stand before the court in the light of a *bona fide* stockholder having a *bona fide* claim against the company.

5. It is a universal rule that when corporators transfer property to a corporation, for which they receive stock, they must act in good faith, and put in the property at its fair worth. Creditors have the right to rely upon the good faith of the stockholders, and to assume that they have contributed to the stock subscribed in money or money's worth, or are liable therefor. This liability cannot be evaded by the issuance of fully-paid stock when it is not, or by putting in property grossly in excess of its real value. *Peninsular Savings Bank v. Black Flag Stove-Polish Co.*, 105 Mich. 535; *Van Cleve v. Berkey*, 143 Mo. 109 (42 L. R. A. 593); *Wetherbee v. Baker*, 35 N. J. Eq. 501; *Coleman v. Howe*, 154 Ill. 458 (45 Am. St. Rep. 133); *Osgood v. King*, 42 Iowa, 478; *Camden v. Stuart*, 144 U. S. 104; *National Tube-Works Co. v. Gilfillan*, 124 N. Y. 302. Had Mr. Moore performed his duty in examining into the value of this property, he undoubtedly would not have consented to becoming a party to such a transaction. As already stated, neither Livingstone nor the others would have subscribed if Mr. Moore had not been connected with the corporation, and, as they believed, in a responsible manner.

6. Complainant's deed was only a mortgage, and the corporation had the right to convey the property in payment of its debts, subject to his mortgage, if valid. The claim that his deed left nothing for the corporation to convey cannot be sustained.

7. Both parties attack the validity of the deeds. We do not deem it necessary to discuss the objections raised. Both deeds are in the nature of mortgages, and as such, we think, were properly executed.

8. It is, however, urged against the claim of the bonus givers that they did not comply with their contracts, and pay the full amount of their subscriptions, although the building was erected, machinery placed in it, some con-

tracts taken, and some men employed. Mr. Moore and his associates had not complied with their contract. He testified: "Practically, there never were any active operations at the factory, so far as I know." It was not contemplated that this building was to be built, and the machinery purchased, and the entire plant constructed upon the bonus subscriptions. It was understood and agreed that there were to be *bona fide* stockholders, liable upon their stock for whatever other funds should be necessary to complete the work. Instead of that, the bonus givers and Mr. Moore contributed all the funds that had been used. The company did not own the machinery that was placed in the building. All the machinery was obtained under a contract providing that the title remain in the vendor until paid for, and, shortly after this trouble began, the machinery was all taken under these contracts. For this condition of affairs Mr. Moore is responsible. He and his associates had broken their contract, and the bonus givers were under no obligation to perform on their part. At the time the deed to Livingstone was made, neither he nor the other bonus givers knew of the contemplated action, or knew the financial condition the company was in. It is probably true that one of the purposes of the Schoonmaker brothers and Hultgren in making the deed to Livingstone was to destroy Moore's security. Whether, in so doing, they acted in good faith, would depend upon whether their version of Moore's agreement with them was true. Even though it were intended to defraud Moore, and though Mr. Livingstone knew nothing about it at the time, still he would be justified in accepting the deed, and the trust thereby conveyed, to secure himself and the others.

9. Defendants' counsel rely upon Act No. 144, Pub. Acts 1895. Section 1 of that act makes it unlawful for any corporation to move, abandon, or discontinue in any way, to any material extent, any factory, etc., without repaying and restoring any and all moneys, bonds, lands, and other property which have been given or granted as a

consideration or inducement to its location or construction. Section 6 provides that, in case of the suspension of any such business on account of the financial failure of the corporation, bonus givers shall become and be creditors of such corporation to the amount contributed, having all the rights of other creditors. Clearly, the first section has no application. The sixth contemplates a failure. That is not this case. There had been no financial failure, because the organization had not fairly commenced the business for which it was organized. This case must, therefore, be disposed of on the general principles of equity applicable to cases of this character.

10. The organization of the corporation was a fraud upon the bonus givers, and complainant, however innocent of intended wrong, was a party to it. He did not perform his contract to organize a company with some responsibility attached to it, and with some tangible assets aside from the bonuses. It was his duty, under his contract, to do this for the protection of the bonus givers. Is it equitable now that he should escape the liability of a stockholder, and be protected in his debt, by taking the lands and bonuses contributed to pay it? The bonuses, including the land, amount to about \$6,000. Under the theory of the complainant there is not now, and was not then, a stockholder of any financial ability, and he knew this. The land and the building thereon are all the valuable assets left. To them Mr. Livingstone, who was not interested in the corporation, has contributed about \$3,700. Is it equitable to permit Mr. Moore to apply this property upon his debt? Is this such action as will satisfy the conscience of a court of equity? We think not. We think the lien of the bonus givers superior to that of Mr. Moore.

11. It is further insisted that the defendant Livingstone must first exhaust his claim against the corporation by suit, judgment, and execution returned *nulla bona*. We have not before us the case of an ordinary creditor enforcing his claim against a corporation. This is a case of defrauded bonus subscribers, who have received no con-

sideration whatever for the gifts made. Parties resort to a court of equity to obtain relief when they have no adequate remedy in courts of law. Technicalities cannot be invoked to defeat the ends of justice and of equity, when they form no insurmountable obstacle to relief. Mr. Livingstone has a mortgage deed, the purpose of which was to secure him and the other bonus subscribers. He had possession under that deed. Mr. Moore resorts to a court of equity to foreclose his lien. All the parties interested, both lien holders, the bonus subscribers through Mr. Livingstone, the corporation, and the property itself, are before the court. We see no obstacle to granting relief.

The decree of the court below will be reversed, and decree entered in this court declaring the lien of Mr. Livingstone superior to that of Mr. Moore. It is stated in the briefs that a receiver has already been appointed. If so, he will be directed to take possession, and proceed to sell and dispose of all the property of the corporation, and out of the proceeds pay—*First*, the costs of such proceeding; *second*, the amounts advanced by the bonus givers, including the land given by Livingstone at its value when the company was organized; and, *third*, to pay Mr. Moore. If no receiver has been appointed, the court below is directed to appoint one. The case will be remanded to the court below to carry out the decree in accordance with this opinion. Defendant Livingstone will recover the costs of this court.

-The other Justices concurred.

URTEL v. CITY OF FLINT.

1. SIDEWALK—DEFECTIVE CONDITION—QUESTION FOR JURY.

Whether a sidewalk which contained a plank broken in such a way as to make a depression of from four to six inches in width, fifteen to eighteen inches in length, and two to three inches in depth, which, when stepped upon, sunk to the ground, a distance of from three to four inches, was reasonably safe for travel, is a question for the jury.

2. SAME—CONSTRUCTIVE NOTICE.

A city is chargeable with notice of a defect in a sidewalk which had existed for several months, and could be seen for two rods.

3. SAME—PERSONAL INJURY—CONTRIBUTORY NEGLIGENCE.

Mere previous knowledge of a hole in a sidewalk does not render one who was injured because of it guilty of contributory negligence in failing to avoid it, without regard to his having it in mind at the time, or to the care which he was exercising.

Error to Genesee; Wisner, J. Submitted October 6, 1899. Decided December 2, 1899.

Case by Charles Urtel against the city of Flint for personal injuries. From a judgment for plaintiff, defendant brings error. Affirmed.

Ed. S. Lee (*J. S. Parker*, of counsel), for appellant.

Brennan & Cook, for appellee.

MONTGOMERY, J. The plaintiff recovered a verdict and judgment for \$450 for injuries sustained by stepping into a hole in a sidewalk, which, it is alleged, the defendant city allowed to become and remain in a dangerous condition. The averment as to the fault of the city is as follows:

"By allowing one of the planks of said sidewalk to be-

122 MICH.—5.

122	65
124	605

122	65
125	627

122	65
880NW	991

122	65
880NW	991

131	448n
122	65
137	56

122	65
j146	180

122	65
150	250

come broken and splintered, thereby making a depression on the surface of said walk of from four to six inches wide, and fifteen to eighteen inches in length, and about two to three inches in depth, which depression, when subjected to the weight of a person's foot and body, caused the splintered portion of said plank, to wit, the depression above described, to sink to the ground beneath the sidewalk, a distance of from three to four inches."

There was testimony fairly tending to support the plaintiff's allegation as to the character of the defect, and also tending to show that the sidewalk in question had been in the condition described for at least two months prior to the injury to plaintiff.

Defendant's counsel contend that such a depression is not a dangerous place, and is reasonably safe and fit for travel, within the meaning of the statute. The question was raised by objection to proofs under the declaration, and also by request to charge. Counsel cite, in support of this contention, *Weisse v. City of Detroit*, 105 Mich. 482, and *Yotter v. City of Detroit*, 107 Mich. 4. In each of the cases cited, the defect alleged was a rise in the sidewalk. In the first case it was stated that the fact that the plank was not nailed down did not seem to have caused the injury. It was the same as though it had been nailed, but was $1\frac{1}{2}$ to 2 inches above the other, so that the question was fairly presented whether such a rise was a defect in the walk so that it was not reasonably safe. It was said, in disposing of the case:

"If the plaintiff could recover in this case, every municipality would be compelled to exercise the most vigilant care over its streets, to see that no rise of two inches occurred along the line of travel on side and cross walks."

The *Yotter Case* follows this holding. These two cases follow the holding that a rise of from two to three inches in a sidewalk is not such a defect as makes the city chargeable under the statute. The duty is thrown upon the traveler to look out for such slight variations in the

walk, and it is assumed that, when properly used, no damage is likely to occur to a pedestrian traveling such a walk. This case presents a very different aspect. The defect did not consist in a slight rise in the sidewalk, but, according to the averments, the plank in question was broken so that there was a depression of from two to three inches, and which was most dangerous. When stepped on, it would sink down three or four inches, thus acting as a trip to one unused to stepping on the plank. We are satisfied that it was a fair question for the jury as to whether the walk was in a condition reasonably safe and fit for travel.

It is further contended that there was no evidence of direct notice to the officers of the city, and that the character of this depression was not such as to afford constructive notice. The defendant raised this question by a request as follows:

"In this case there is no evidence of notice to the city of the defective condition of the plank in the place in the walk called the 'driveway,' where plaintiff, by his proof, claims he was injured. There is no proof of any actual notice, and the defect in the plank, as described by all the witnesses, was a latent one, not easily observed, and it was not such a defect as would be notice of itself to the city."

There was testimony by numerous witnesses that this defect in the walk had existed for a number of months, and that it could be discovered at a distance of two rods. The defect could not, as matter of law, be said to be latent. *Menard v. City of Bay City*, 114 Mich. 450.

It is also urged that, as plaintiff had previous knowledge of the hole in question, he was guilty of negligence in stepping into the hole. The question was raised by the following request:

"The plaintiff in this case knew of the defect. To go to his home, the evidence shows, he might have avoided the place by walking on the other side of the street. I charge you that he is guilty of contributory negligence, and cannot recover."

This request treats previous knowledge of the defect as sufficient to bar recovery, without regard to whether the plaintiff had it in mind at the time, or to the care taken to avoid injury. The rule proposed in this request is not in harmony with our previous holdings, and the request was properly refused. *Lowell v. Township of Watertown*, 58 Mich. 568; *Sias v. Village of Reed City*, 103 Mich. 312; *Schwingschlegl v. City of Monroe*, 113 Mich. 683. See, also, *Crites v. City of New Richmond*, 98 Wis. 55, and cases cited.

Some complaint is made of the language used by counsel in the argument to the jury. We do not think it was of such a character as to influence the verdict.

The judgment is affirmed, with costs.

The other Justices concurred.

ST. JOHN v. ANTRIM IRON CO.

ASSUMPSIT—CONVERSION OF TIMBER—WAIVER OF TORT.

At common law, *assumpsit* may be maintained, at plaintiff's election, for the conversion of property into money or money's worth, or for the conversion of property which defendant held by virtue of contract relations with plaintiff. By statute (3 Comp. Laws 1897, §§ 11207, 11208), *assumpsit* also lies on behalf of one who has a right of action for the taking of timber or other trespass on lands, or for any other direct or consequential injury thereto. Held, that there is no authority for bringing *assumpsit* against one who merely purchased for his own use, from a trespasser, wood cut and removed from plaintiff's land.

Error to Antrim; Mayne, J. Submitted October 6, 1899. Decided December 2, 1899.

Assumpsit by Edgar St. John against the Antrim Iron

122	68
128	138
122	68
880NW	998

Company to recover the value of certain wood cut by a third person from plaintiff's land, and sold to defendant. From a judgment for plaintiff, defendant brings error. Reversed.

T. J. O'Brien and James H. Campbell, for appellant.

Nelson C. Weter, for appellee.

MONTGOMERY, J. The plaintiff is the owner of the original title to the N. $\frac{1}{4}$ of the N. W. $\frac{1}{4}$ of section 26, town 28 north, range 7 west, Kalkaska county. In the winter of 1896-97, one James Boussum, claiming title under a tax deed from the auditor general for the taxes of 1892, entered upon the land, and cut and removed therefrom 538 cords of wood. This wood was hauled by Boussum and his licensees to Leetsville, and there sold to defendant, who burned the same into charcoal, and used the charcoal in the manufacture of pig iron. Subsequently the tax deed was vacated by a certificate of error. The plaintiff brought this suit in *assumpsit*, and recovered the value of the wood at the place of delivery.

It is perhaps to be regretted that the case must be determined by a ruling not going to the merits of the controversy, but we feel compelled to hold that, under the facts of this case, there could be no recovery in *assumpsit*. When the defendant has converted property of the plaintiff into money or money's worth, the plaintiff may waive the tort, and sue in *assumpsit*, treating the sale as made on his behalf. So, where defendant holds possession of property by virtue of contract relations with plaintiff, and converts such property, the plaintiff may, at his election, proceed in *assumpsit*. These are the only cases in which the plaintiff has election, under the common law. *Watson v. Stever*, 25 Mich. 386; *Tolan v. Hodgeboom*, 38 Mich. 624; *Tuttle v. Campbell*, 74 Mich. 652 (16 Am. St. Rep. 652). Nor is the statute (3 Comp. Laws 1897, §§ 11207, 11208) broad enough to aid the plaintiff. This statute is entitled "An act to facilitate the collection of damages for

trespass on or other injuries to lands." The act provides that, in all cases where a party has a right of action for the taking of timber or other trespass on lands, or for any injury to lands, whether direct or consequential, it shall be lawful for the party having such right of action to waive the tort, and bring *assumpsit* therefor. It is apparent that the plaintiff is not seeking to recover for a trespass on lands, and that, if he were, the defendant is not shown to have had any part in the trespass, except as buying the cord-wood after its severance can be considered as trespass. We think it cannot be so treated.

Judgment must be reversed, and no new trial ordered.

The other Justices concurred.

122	70
127	195
122	70
80	987
122	70
142	658

CITY OF ST. JOSEPH v. SEEL.

ADVERSE POSSESSION—LICENSEE.

The possession of one who enters upon land under license from another claiming title, and who occupies the land for a series of years, doing nothing inconsistent with his holding as licensee, does not begin to be adverse until he notifies the licensor of a hostile claim.

Error to Berrien; Coolidge, J. Submitted October 6, 1899. Decided December 2, 1899.

Ejectment by the city of St. Joseph against Henry Seel and others, trustees of the First German Baptist Church of St. Joseph. From a judgment for defendants, plaintiff brings error. Reversed.

O'Hara & O'Hara, for appellant.

Lawrence C. Fyfe and *N. A. Hamilton*, for appellees.

LONG, J. Action of ejectment. Defendants, as trustees, are in possession of the land in controversy. This land, known as "Lot 383," is a part of a plat made by the proprietors of the town of Newberryport, and duly recorded, and situate within what is now known as the "City of St. Joseph." The proprietors of the land platted, in 1834, gave a deed of it, with other lands, to the president, trustees, and freemen of the village. It was called in the plat "Academy Lot." It appears that the village of St. Joseph deeded to the defendant society lot 384, which was shown on the plat as "Church Lot." This deed was made in 1860. The defendant society at once erected a church building thereon. Lot 383 remained vacant until some time in 1873, when a man by the name of Lessing moved upon it, but by what authority does not appear. He had a small house there, but it is not shown that he claimed title. In the spring of 1881 the defendant society was desirous of building a brick church upon lot 384, to which it had title. The society thereupon moved the old church—a frame building—upon lot 383, the title to which is in controversy here. Some arrangement was made with Lessing by which he vacated the lot, and his house was moved off when the old church was moved on. The defendant society claims to have been in open, hostile, and adverse possession of the property since that time. The facts upon this branch of the case are not much in dispute.

The only title which the plaintiff showed was the plat, and the deed to the village of St. Joseph. It was not shown that the village or city of St. Joseph was ever in possession. The court stated to the jury that the plaintiff had not shown title, or that it had ever had possession of the land. Counsel for plaintiff claimed, however, that the defendant society went into possession in 1881, under a license from the city, and that, therefore, it was in no position to set up a claim of title adverse to the city. The court charged the jury as follows:

"The plaintiff in this case has not shown any title to this land by record or possession. The evidence on the

part of the plaintiff in this respect has failed; that is, the plaintiff has not shown what we call title either by possession or by record. It is claimed, however, by the plaintiff, that in April, 1881, the defendants sought permission of the city to occupy the premises for temporary purposes; that they obtained such permission of the council, and thereupon entered upon the premises under the leave and license of the council, and recognizing the title of the plaintiff in the premises. If this theory be true, then the possession of the defendants, the church, so obtained, would not be adverse, and no title would be acquired by the defendants so long as that kind of occupation continued; and, if that kind of occupation continued into a period of within less than 15 years before the commencement of suit, then the plaintiff can recover. The defendants in this case, however, claim that they have held adverse possession of these premises for more than 15 years before the commencement of this suit. Suit was commenced September 9, 1898. A person is said to be in adverse possession of a piece of land when he occupies a piece of land claiming to own it. If such possession is continuous, open, exclusive, notorious, and hostile, then such possession ripens into a complete title, as good as any other title, at the expiration of 15 years. No deed is necessary, or any written title or paper of any kind, to base adverse possession upon. Naked possession alone, without any deed or paper of any kind, is sufficient to base adverse possession upon, if the party claims the land to be his own, and such occupancy continues for 15 years openly, exclusively, and in a hostile way. This law, gentlemen of the jury, is a wise one. * * *

“It is immaterial, also, whether possession was originally acquired by permission or not, if at some time after entry the party claimed the land, and occupied it continuously, openly, and exclusively, and in a hostile way, asserting ownership, and so occupied it for 15 years. If, however, the party entering enters under a license, or by permission of another party, and does not claim to own it, but occupies it subordinate to the party permitting him to occupy it, and under certain conditions, then there can be no adverse possession so long as that condition of things exists. That is to say, if the party goes in under some license, and recognizing the title of the party that lets him in, no adverse possession can exist so long as that condition of things exists. If permission is given to enter upon

the land, and the party enters upon the land, claiming it as his own, then adverse possession may begin. The defendants in this case claim that upon their entry upon this lot, or shortly after, they actually claimed to own the land, and made improvements, and have openly, notoriously, and exclusively been in possession of these premises, claiming them to be their own. If these facts be true, the plaintiff is not entitled to recover. Mr. Benning and some other witnesses testify in this case on the part of the defendants that, after the church took possession of the premises, the church claimed to own them, and used them continuously and openly, and have had exclusive possession of these premises for more than 15 years prior to the commencement of the suit. If these witnesses testify to the truth, then the plaintiff cannot recover. It is for you to say whether they testify to the truth or not. If you do not believe these witnesses, if you believe the church went upon the land under a license of the city council, recognizing the ownership of the city, with no idea of claiming to own it themselves, then the possession of the church would not ripen into a title so long as that kind of occupancy continued. There would be no adverse possession under that state of facts. But if the church entered upon the lot with the idea that the city had no use for the lot, and had no objection to the occupancy by the church, and took advantage of the permission of the council to occupy it under a claim of ownership, then, although the church may have been mistaken, and although the council may not have intended to give the land to the church, such occupancy would be the basis of adverse possession. The real question before you is, What was the real character of the possession by the church? Have they occupied it under the idea and claim that they owned the land, that it was theirs, for 15 years prior to the commencement of this suit, or is their claim in this respect fraudulent and untrue? This is the square issue before you. It is for you to determine. The whole facts are before you, and the responsibility, so far as the facts are concerned, devolves upon you entirely. I have endeavored to give you the law as I believe it to be. I don't think there is any particular controversy among the attorneys as to the law that governs the case."

The jury returned a verdict in favor of defendants. Plaintiff brings error.

Counsel excepted to the refusal of the court to give the requests asked and to the charge as given. Counsel for plaintiff asked the court to charge the jury that:

“If you find that the trustees of the First German Baptist Church recognized that the plaintiff was the owner of the lot in question in the spring of 1881, and requested permission of the council of St. Joseph to remove their old church building upon this lot for temporary purposes, and that such permission was granted by the council, and that, acting under that permission solely, the church people moved upon said lot, then I charge you that plaintiff is entitled to recover.”

This was refused, except given modified in the general charge.

Counsel also asked the court to charge:

“It matters not what may have been in the minds of the church people, if they did obtain permission from the council, before their possession would commence to be adverse, they must notify the landlord of such hostility before adverse possession can commence.”

The court, in refusing this request, stated to the jury:

“I don't understand it is necessary in cases of this kind that any written notice must be given to the party that gave the permission. The adverse possession may be shown by proof of facts, notorious possession, exclusive, making improvements, and all those things. It is not necessary to prove any direct verbal notice. Still it is necessary that the defendants shall show by a preponderance of evidence that there were acts—notorious acts—indicating a claim of ownership, and under such circumstances that the city would reasonably be expected to take notice of it.”

1. It is contended that the court did not give the jury proper instruction upon the question of what would constitute adverse possession which would ripen into title. We need not consider that question, as we think the requests to charge should have been given.

2. It is contended that the court erred in not giving the requests to charge, and that the second request, given above, stated the law correctly; that, if the defendants

did obtain permission from the city to move onto the land, they could not be treated as holding it adversely until they had notified the city that they intended to hold in hostility to it. There was testimony given by plaintiff tending to show that the trustees of the defendant church society, or some of them, in 1881 appeared before the council, and asked permission to move the old church on the lot in question. Two of the trustees of the church society were at that time members of the board of trustees of the village. These two trustees both testified that, as soon as the old church was moved on the lot, the church society claimed to own it; but they admitted that nothing was said to the other trustees of the village about the claim then made. There is no evidence in the case that the trustees of the village were notified that the church society claimed to own the property. It appears that, after this license to occupy the lot was granted by the village officers, the building was moved upon it, and put upon brick piers; the lot was filled by hauling in earth, and a sidewalk built in front of the property; trees were planted, and the old church occupied. During two years the church society rented the property to the board of education at an annual rental of \$200. While it appears that the members of the society talked among themselves that they did not recognize that the city had any interest in the lot, yet it is not claimed that they ever told any one outside of the society that they made such claim of ownership. Here, then, is shown an entry upon the property by the defendants under a license from the city, the city then claiming title under a deed from the platters. There is nothing in the record showing that the acts done by the defendants were any different from what might be expected from a mere licensee. The church society paid no rental, and, naturally, what improvements were made it made itself. It moved its building upon the lot. The lot was low, and it filled it up. It planted trees, and built the sidewalk. It continued in possession from 1881 to 1898, when this suit was commenced; and during all that time, if the testi-

mony of the two trustees is to be believed, they intended to claim title for the society, and yet said nothing to the village officers about it, although these two trustees were members of the village board at the time the license was granted. We think it is the settled rule of law that, if possession of real estate is held by mere indulgence or by consent of the owner, and the person so going into possession understands this, the possession is not adverse, and cannot ripen into a title which will defeat the right of the legal owner. This doctrine is fully stated in *Larwell v. Stevens*, 2 McCrary, 311, 12 Fed. 559. See, also, *Main Township School District v. Reichard*, 142 Pa. St. 226. It was said in *Smith v. Hitchcock*, 38 Neb. 109:

“There is no evidence in the record that establishes or tends to establish the fact that Mrs. Smith’s possession was an adverse one, nor that she entered into possession of these premises with the intention of claiming them as her own, nor that she ever held, after entry, in hostility to the defendant in error. Mrs. Smith’s entry on this lot was by permission of the owner of the legal title, and her possession thereafter was permissive, and not adverse; nor could it become so until such time as she began to occupy under a claim of right, with notice of such claim brought home to the owner,”—citing in support of that doctrine: *Harvey v. Tyler*, 2 Wall. 328; *Allen v. Allen*, 58 Wis. 202, 209; *Perkins v. Nugent*, 45 Mich. 156; *Davenport v. Sebring*, 52 Iowa, 364; *Pease v. Lawson*, 33 Mo. 35; *Smith v. Stevens*, 82 Ill. 554.

In the present case there was no claim that any notice was ever given the city that the defendants set up any such claim, or intended to claim title, and that they held possession in hostility to the city. The court should have given the requests tendered by the plaintiff.

We need not discuss the other assignments of error. The judgment below must be reversed, and a new trial ordered.

The other Justices concurred.

REED v. REED.

122	77
80W	996
80AB	541
d188	207

TENANCY IN COMMON—FORECLOSURE SALE—PURCHASE BY CO-TENANT—BILL FOR PARTITION—OFFER TO REDEEM.

Tenants in common cannot maintain a bill for partition against a co-tenant who has bid in the premises on foreclosure of an outstanding lien, without offering to contribute their proportionate shares in redemption from the sale.

Appeal from Livingston; Smith, J. Submitted October 24, 1899. Decided December 2, 1899.

Bill for partition by Melissa Reed, Alice Secor, and Frank Ray against Charles Reed, John Ray, Sarah Wright, and Horace Pierce. From a decree for complainants, defendant Reed appeals. Reversed.

Lucy A. Reed died intestate, possessed of two parcels of real estate. Defendant Reed was her husband, and the complainants and other defendants her brothers and sisters, except defendant Pierce, who is the son of a deceased sister. The parties, complainants and defendants, were therefore tenants in common of the land. There was a mortgage upon one parcel for \$1,000, and upon the other parcel for \$400. Defendant Reed purchased these mortgages in the name of one Joseph H. Tiffin. This was done by the advice of his attorneys, in order to avoid any question of merger. The mortgages were due, and were foreclosed by advertisement in the name of Mr. Tiffin, and bid in by Mr. Reed for the sum of \$1,587.69, —the amount due, with interest and costs. The defendants Ray, Wright, and Pierce are interested with the complainants. Mr. Reed made no attempt to conceal the transaction. No fraud or concealment is charged. The time for redemption expired April 5, 1899. On January 30, 1899, complainants filed this bill for a partition, without

tendering or offering to pay their proportions of the amount in redemption from the sale. The case was heard upon pleadings and proofs on May 1, 1899. At the hearing defendant Reed was permitted to file a supplemental answer, showing that there had been no redemption from the foreclosure sales. The court entered a decree fixing the amount of Mr. Reed's lien at \$1,641.29; directing a sale of the premises; that the amount due Reed be first paid, and the balance divided among the co-tenants.

Louis E. Howlett, for complainants.

Gray & Gray, for appellant.

GRANT, C. J. (*after stating the facts*). The theory of the bill is that the foreclosure deed to defendant Reed is absolutely void, and that he could obtain no title, as against his co-tenants, by purchasing and foreclosing the outstanding liens. The deed was not void, but voidable. This is conceded by counsel for Mr. Reed, and they admit that timely proceedings in redemption by the co-tenants would have defeated his title. It was necessary for the protection of all that some one of the co-tenants should either pay or purchase these mortgages, or, if foreclosed by the mortgagee, protect their interests upon the sale by purchase, or redemption after sale. Mr. Reed was the owner of the undivided six-twelfths, and he chose to purchase and foreclose the liens. The law gave him the right to do this. The law also gave the right to his co-tenants to share in the benefits of that sale by contribution. They did not do this, but seek to impose upon Mr. Reed all the cost and risk. If the property should not sell for sufficient at the sale upon this decree to pay the amount of indebtedness, he will be out all his expenses, and has been subjected to the costs of this suit, while his co-tenants lose nothing and assume no risks. The law does not permit co-tenants to thus speculate with their common property. Law and equity deal with co-tenants after one of them, as

he has the right to do, has purchased the outstanding liens or titles. Before co-tenants can take proceedings to secure the benefit of such purchase by another co-tenant, they must do equity, namely, tender or offer to contribute their proportionate shares of the amount paid in purchase of these outstanding liens. Freem. Co-Ten. § 154; 11 Am. & Eng. Enc. Law, 1083; *Lee v. Fox*, 6 Dana, 171; *Brittin v. Handy*, 20 Ark. 381 (73 Am. Dec. 497); *Flagg v. Mann*, 2 Sumn. 523; *Buchanan v. King's Heirs*, 22 Grat. 419; *Mandeville v. Solomon*, 39 Cal. 133; *Wilmot v. Lathrop*, 67 Vt. 671; *Stevens v. Reynolds*, 143 Ind. 467 (52 Am. St. Rep. 422). Co-tenants desiring to share in such purchase must move promptly; that is, within a reasonable time. The co-tenants in this case have not moved at all, except upon the theory that the purchase by the co-tenant was absolutely void, and that they were not subject to contribution. They have neither done, nor offered to do, equity.

Decree reversed, and bill dismissed, with the costs of both courts.

The other Justices concurred.

STEKETEE v. PRATT.

1. LANDLORD AND TENANT—SURRENDER OF LEASE—EVIDENCE.

Where a lessee gave 30 days' notice of intention to quit, and the parties then, without waiving any other rights or admitting any liability, agreed that, if the lessor's attorney should procure a satisfactory tenant, no claim would be made on the lessee for rent after the commencement of such latter tenant's term, and at the end of the 30 days the lessee took the key to the lessor, who told the lessee to leave it with the lessor's attorney, no intention of the lessor to surrender his rights under the lease by acceptance of the key is shown.

2. SAME—PAROL AGREEMENT FOR LEASE—STATUTE OF FRAUDS.

The tenancy is not at will, but from year to year, or at least for a year, where entry was under a parol agreement for a lease for three years, at a specified annual rental, payable monthly in advance.

Error to Emmet; Adams, J. Submitted October 24, 1899. Decided December 2, 1899.

Assumpsit by George G. Steketee against Charles R. Pratt for rent. From a judgment for defendant, plaintiff brings error. Reversed.

Maher & Salisbury, for appellant.

Halstead & Halstead, for appellee.

MOORE, J. Plaintiff sued defendant to recover for the rent of a store situated in Grand Rapids, from December 1, 1898, to March 24, 1899. In May, 1898, the parties had an interview at the store in relation to its rental. The defendant desired to rent it for three years, with the privilege of three years more if he desired. The plaintiff asked him \$1,400 a year rent, payable monthly in advance. The defendant agreed to pay that rent if plaintiff would make certain repairs, which the plaintiff agreed to make. To

avoid any misunderstanding as to what repairs should be made, the defendant made a memorandum reading as follows:

"Run partition across store where wanted, not north of jog. Put old linoleum back of partition, and new linoleum to cover floor front of partition, selected by tenant. Paper store front of partition; nice paper, selected by tenant. Toilet room upstairs, and any little repairs needed and not mentioned above. Lease to commence June 1, 1898, and run three years, with privilege of three longer at expiration."

It was agreed that a written lease should be signed later. The plaintiff made the repairs, and the defendant took possession of the store, and paid the rent for several months. A written lease was prepared by plaintiff, and, according to his version, was left with defendant, who said he would look it over and sign it later. It in fact was never signed. According to the version of defendant, the lease contained some minor provisions which were objectionable to him, and he told plaintiff he would not sign the lease as drawn. Defendant continued in the possession of the store until October 1st, when he sold his stock of goods to Mr. Mitts, who occupied the store during October and November, and paid the rent for those months, through defendant's attorney, Mr. Doran, to the plaintiff. A dispute arose between the parties, and the following agreement was made:

"*Memoranda of agreement between Charles R. Pratt and George G. Steketee Witnesseth*, that a controversy having arisen between said parties as to the continuing liability of said Pratt to said Steketee for rental of store and basement, number 89 Monroe street, Grand Rapids, Michigan, from and after December 1, 1898, it is hereby agreed by them as follows:

"1. That Edgar A. Maher be authorized to procure a tenant for said store, if he is able to do so upon terms satisfactory to said Steketee.

"2. If such tenant is procured, said Steketee will make no claim upon said Pratt for rental of said store for any

time subsequent to the commencement of such tenant's term of rent.

"3. Said Steketee does not, by making this agreement, waive any right or claim of right to recover from said Pratt for any time that said store shall not be rented to such tenant subsequent to December 1, 1898.

"4. Said Pratt does not, by making this agreement, admit that he is or will be liable to said Steketee for rent of said store from or after December 1, 1898.

"Dated November 4, 1898.

"CHARLES R. PRATT.

"GEORGE G. STEKETEE."

Mr. Maher found a tenant, whose term began March 24, 1899. It is to recover the rent for the period the store was unoccupied that this proceeding is brought.

To the declaration filed by the plaintiff, the defendant pleaded the general issue, and gave notice of the following defenses:

"1. That the contract of lease between the said parties was a lease at will, terminable by 30 days' notice, and that the same was terminated in due form, in writing, before any of the sums claimed by said plaintiff in his declaration as due him matured, and that the same were not earned by plaintiff.

"2. That plaintiff could have replaced defendant by a tenant before any of the said sums claimed by him were lost by plaintiff by the vacancy of the building described in declaration.

"3. That nothing is due plaintiff from defendant."

In his opening statement to the jury, counsel for defendant claimed that what occurred between the parties was simply an agreement that a lease should be executed, and that no lease was ever made. He claimed that, as the oral talk was for a leasing for a term of years, it was void, and that the tenancy was a tenancy at will. On the defense he showed as follows by Mr. Doran, defendant's attorney:

"I served a copy of this [referring to paper]. I served it on Mr. Steketee personally on October 29, 1898. I served at Mr. Pratt's request or instructions, as his attorney. (Said paper was then read to the jury as follows:)

“‘Please to take notice that, on the 30th day of November next, I shall quit possession and remove from the premises I now occupy, known as the store and basement at No. 89 Monroe street, in the city of Grand Rapids.

“‘Dated this 28th day of October, 1898.

“‘Yours, etc.,

“‘CHARLES R. PRATT.

“‘To GEORGE G. STEKETEE, Owner.’

“‘The last of November (30th of November), I took the keys—after everything had been cleaned out of the store—I took the keys over. Well, I went to Maher & Salsbury’s office, as they were attorneys for Mr. Steketee, and they were not in town; they were not either of them (Mr. Maher or Salsbury) in; and I went to look for Mr. Steketee, and I found him at the Masonic rooms, playing cards. I tendered him the keys. He says, ‘You give them to Maher & Salsbury.’ I says, ‘They are not in town today.’ ‘Well then,’ he says, ‘they are all right. Take them and deliver them over to the office.’ I says, ‘You are the person to deliver them to.’ He says, ‘You take them over there.’

“Q. Did you do so?

“A. Yes, sir.

“Q. When was that?

“A. The 30th of November.

“Q. 1898?

“A. Yes, sir.”

Cross-examination by Mr. Maher:

“A. Mr. Steketee did not mention Mr. Salsbury’s name. He says, ‘Mr. Maher is my attorney;’ and I told him I had been over to your office.

“Q. At that time you knew of the arrangement that had been made?

“A. Yes, sir.

“Q. You yourself had delivered to me this paper with Mr. Pratt’s signature on it?

“A. Yes; that’s right.

“Q. You went there to deliver the key to me, in the first instance, before going to Mr. Steketee?

“A. Yes, sir. Well, I wanted to see you about whether you would consider it all right for me to deliver it to you, or if I should see Mr. Steketee and deliver it personally to him, and found you were not in town; that is what the office informed me.

"Q. You left the key there at my office?

"A. I did, after I had seen Mr. Steketee, and he told me to leave it at your office. I offered it to him, and he told me it was all right to leave it at your office."

Mr. Steketee's version of the transaction is as follows:

"Q. Do you know what became of the key or keys of that building on their surrender by Mr. Pratt?

"A. My attorney, I believe, had it. I do not know when it was they were turned over to him. I remember of their being brought to me by Mr. Doran. I don't remember when that was. He brought them to me. I says: 'I have nothing to do with them. You take them to my attorney.'

"Q. Mr. Maher was your attorney in that transaction, the same as in this one?

"A. Yes, sir.

"Q. Didn't Mr. Doran say to you at that time that your attorney was not in the city?

"A. No, sir.

"Q. And that you stated to him he should leave the keys in the office?

"A. He did not."

I have quoted all of the testimony upon the subject of the surrender of the keys.

The plaintiff requested the judge to direct a verdict in his favor. This he declined to do. The defendant requested the court to instruct the jury that the tenancy was at will, and was terminated by the notice served in October, and defendant was under no obligation to pay rent after November. This the judge declined to do. He instructed them that the bargain created a tenancy from year to year, or at least for one year, and then proceeded to tell them that the parties might surrender their rights under such a lease, and told them, if Mr. Steketee accepted the key, intending to surrender his rights under the lease, that he could not recover. This last proposition was error. It was the theory of the defendant, from the time he interposed his plea until he filed his request to charge, that the tenancy was one at will, which had been terminated by notice. There was no claim in the case,

until made by the circuit judge, that, by the delivery made of the key by Mr. Doran, the plaintiff had changed the legal relations, whatever they were, which existed between the parties. It is evident Mr. Doran was seeking by giving the notice in October to terminate the tenancy in November, which he construed to be a tenancy at will. Giving his version of what occurred at the time he offered the key to the plaintiff the most favorable construction possible to the defendant, it is consistent with the idea that he was referred by the plaintiff to Mr. Maher because, by the agreement between the parties, Mr. Maher was to get a tenant as soon as he could. It fails entirely to show that Mr. Steketee intended by that act to surrender the rights which he claimed existed by virtue of the bargain made between the parties. In *Stewart v. Sprague*, 71 Mich. 50, it is said, "In all cases of a leasing, to show a surrender, a mutual agreement between the lessor and the original lessee that the lease is terminated must be shown." It must be shown the lessor and the lessee mutually agreed to a surrender of the term. This was not done, and the court erred in allowing the jury to so find, in the absence of any testimony tending to show that it was done. *Scripps v. Reilly*, 38 Mich. 10.

It was urged in the court below, and it is urged here, that the tenancy was a tenancy at will; counsel citing, among other cases, *Barrett v. Cox*, 112 Mich. 220. In that case Justice MONTGOMERY said:

"In the present case, the oral lease being void, there was no definite term of occupancy fixed by the contract. Neither was there a reservation of annual rent, or rent payable at any stated intervals. Under these circumstances, we think a tenancy from year to year cannot be said to have been created."

In the case at bar there was to be an annual rental of \$1,400, payable monthly in advance. In *Huntington v. Parkhurst*, 87 Mich. 38 (24 Am. St. Rep. 146), there is an exhaustive discussion of this question, and it is shown that the tenancy created here was from year to year, or at least was for one year.

Under the facts as shown upon the trial, a verdict should have been directed in favor of the plaintiff.

Judgment is reversed, and new trial granted.

GRANT, C. J., MONTGOMERY and LONG, JJ., concurred.
HOOKER, J., took no part in the decision.

KOMPASS *v.* LIGHT.

1. MALICIOUS PROSECUTION—ATTACHMENT—ADVICE OF COUNSEL—PROBABLE CAUSE.

Proof that defendant in an action for malicious prosecution of a writ of attachment acted upon the advice of counsel, given after a full and fair statement of all the material facts known to defendant, establishes probable cause, even though the advice given was not warranted by the facts disclosed to the attorney.

2. SAME—QUESTIONS FOR COURT.

The question of probable cause for suing out a writ of attachment is one of law for the court, where the facts are undisputed.

3. ATTACHMENT—EXCESSIVE LEVY.

The fact that property seized on attachment for a debt of \$1,150 was inventoried at \$4,400 does not show that the levy was so excessive as to defeat plaintiff's rights under the writ.

Error to Berrien; Coolidge, J. Submitted October 24, 1899. Decided December 2, 1899.

Case by Rudolph F. Kompass and Matthew Stoll, co-partners as Kompass & Stoll, against William Light, for malicious prosecution of a writ of attachment. From a judgment for defendant, plaintiffs bring error. Reversed.

Marshall L. Howell and *Edward Bacon*, for appellants.

O'Hara & O'Hara, for appellee.

LONG, J. Plaintiffs commenced business in Niles in 1895, as manufacturers of tables. They constructed a factory and bought machinery. It appears that a considerable loan of money was necessary with which to commence business. They gave a mortgage on the real estate to Reddick & Johnson for \$7,800, payable in monthly installments of \$50. In 1897 the firm became largely indebted. It owed the bank at Niles something over \$7,000, and also owed the defendant \$1,150. It gave the bank a chattel mortgage for the amount of its claim. This mortgage was given December 9, 1897. On January 15th following, the defendant sued out a writ of attachment against the plaintiffs in the circuit court of that county, stating in his affidavit for the writ that "he has good reason to believe, and does believe, that the said defendants have assigned, disposed of, and concealed their property with intent to defraud their creditors." The writ was placed in the hands of the sheriff, and he at once took possession of all the property in and around the mill, which property was inventoried at the sum of \$4,401.60. The sheriff, also, under the direction of the attorney for the plaintiff in the writ, closed the mill, and held possession of the property until February 1st following. The plaintiffs here were at that time employing some 25 or 30 men, and apparently doing quite a large business. The plaintiffs here commenced proceedings before the circuit court for a dissolution of the attachment, and on February 1st the attachment was dissolved, and the plaintiffs restored to possession. The present suit was then commenced to recover damages which plaintiffs claim resulted from the malicious and wrongful suing out of the writ of attachment. The case was tried before a jury. Verdict was returned in favor of defendant, and plaintiffs bring error.

The defense was that there was probable cause for the suing out of the writ, that there was no malice, and that defendant relied upon the advice of his counsel.

The court charged the jury upon these questions as follows:

"If he [defendant] has no cause of action, and knows it, or believes he has none, or has no good reason to believe he has any, he is liable in this form of action; but if he has reason to believe that a fraudulent conveyance has been made by the debtors, or that they have concealed their property fraudulently, and in good faith causes a writ of attachment to issue upon those grounds, and because he believes that a fraud has been perpetrated, then he is protected from liability. In such cases probable cause exists. He cannot act upon every surmise or conjecture, unwarranted by any facts or information. He must have such facts and information before him as lead men of ordinary prudence, under like conditions, to believe that a fraud has been committed. It is claimed in this case by the defendant that he is protected from liability on account of the advice of counsel. The general rule is, if a client in good faith states all the facts which he knows or could have learned by reasonable diligence to his attorney, and his attorney then informs him he has a cause of action, and he after that acts upon such advice, he is protected from liability by reason of such advice. The facts communicated must bear upon the remedy adopted. In this case it is claimed by the defendant that he proceeded upon the ground that the chattel mortgage to the bank was void, and the plaintiffs had fraudulently concealed their property. If he stated all the facts to his attorney bearing upon these issues, and the attorney thereupon advised him he had a cause of action, he would be protected, if he acted in good faith. If, however, attachment proceedings were instituted, not because he had good reason to believe the chattel mortgage was void, but as a mere expedient to collect a debt when he knew he had no ground to base an affidavit of attachment upon, then he would be liable. If the attachment proceedings arose from a mere arrangement between the attorney and client for the purpose of collecting a debt, when they both understood that they had no ground for suing out the attachment, the client would still be liable. The client has a duty to perform as well as the attorney. He must act in good faith, and with a belief, not merely that an attachment is the remedy, but the proper and lawful one. If he has disclosed the facts, and the attorney then tells him that such facts furnish sufficient ground for him to make the affidavit, and the client relies in good faith upon this advice, and makes the affidavit, he will be

protected. It is contended by the defendant that such is the fact. It is contended by plaintiffs that the defendant did not state any facts authorizing, or tending to authorize, the making of the affidavit for attachment, and the attachment was instituted, not because there was any lawful ground for it, but simply as an experiment, without lawful ground, to enforce the payment of the defendant's claim. This is a matter of fact for you to determine.

"It is also claimed that the act of the defendant in suing out the attachment was reckless and negligent. If this be so, the defendant is liable, even though the attorney may have advised him to commence attachment proceedings. A mere direction by the attorney to commence an attachment is not sufficient alone to protect the client from liability. It must be advice that the attachment proceeding is proper and authorized, upon the facts stated by the client to counsel, or upon facts known by both, or advice that the client has good reason for instituting the attachment. The attorney, however, may be mistaken in giving his opinion,—that is, he may be mistaken as a matter of law,—and yet, if the attorney gives his advice in good faith to his client, the client would have a right to rely upon it even though the attorney was mistaken. If the attorney informed his client, after a full statement of the facts, that an attachment proceeding is proper and lawful, and the client himself acts in good faith and relies upon the advice, he is protected. A client cannot act, however, upon mere suspicion or conjecture alone. He must exercise that prudence which men of ordinary prudence would use under like conditions. Then the law will protect him. If he acts carelessly and recklessly, he is liable for the consequences of his wrongdoing. Attorneys sometimes advise clients to commence attachment proceedings, not because there is lawful ground for it, but as an expedient for forcing the payment of a debt. In such cases they inform their clients very often, although they have no good ground for attachment, that they stand a good chance of collecting their debt in this way. In such cases the client takes his chances. He is liable for damages if he causes property to be seized under such circumstances. Of course, in this case, the defendant denies that any such circumstances exist, while the plaintiffs claim that they do exist.

"There are two main questions before you: *First*, whether there was probable cause for the issuing of this

attachment; *second*, whether the advice was given by counsel under such circumstances that it furnished a protection to the defendant in this case. Those are the two main questions. So far as the question of the unlawfulness of this attachment proceeding, that has been determined by the proper tribunal having jurisdiction in the matter. That tribunal decided that the attachment itself was unlawful, and no cause existed for it. So there is nothing upon that question for you to act upon. You are simply to act upon the question whether there was probable cause for getting out the attachment, and whether the defendant acted upon legal advice, under circumstances that justified him."

Counsel for plaintiffs asked the court to charge:

1. That plaintiffs are entitled to recover, and the only question for determination is the amount of the verdict.
2. That the advice of defendant's counsel was not given upon such a state of facts as makes it a protection to the defendant.
3. That the levy was excessive to such an extent as to make the defendant liable.
4. That the writ of attachment dated January 15, 1898, was illegal, and was adjudicated to have been issued without any valid cause whatever.

These requests were refused, except the last, which was given in the general charge. The main contention in the case arises out of the first and second requests to charge.

The facts testified to by the defendant, and upon which he claims to have acted, are that Kompass & Stoll owed him \$1,150; that he had dealt with them for several years, and had been in the habit of taking their notes for lumber sold them, and discounting them at the bank, where they would be paid by Kompass & Stoll when due; that, as to this claim of \$1,150, he tried to get a note from Kompass & Stoll, but, before doing this, he went to the cashier of the bank, and was informed by him that, if the books of Kompass & Stoll showed that they were doing as well as they thought or claimed, the bank would take the note if he got it; that, not getting the note, he delayed a week, and then found that Kompass & Stoll had given the

chattel mortgage to the bank for \$7,660.72, covering the whole of their personal property. This mortgage was given December 9, 1897. Defendant also testified that, on December 23d following, he received a circular letter from Kompass & Stoll, as follows:

“NILES, MICH., Dec. 23, 1897.

“*Dear Sir:* It is unnecessary for us to say that the past two and a half years that we have been in business at Niles have been hard years for small manufacturers of furniture. We have worked hard and practiced the strictest economy, but the pinch lasted too long, and the First National Bank of Niles, which has carried us since we started in business, compelled us to secure them by chattel mortgage, December 9, 1897. The debt amounted to \$7,660.72. We also owe a mortgage of \$7,800 on our plant, put on in July, 1895, to raise money for its construction. On this we have 13 years' time from July, 1895, in monthly payments. There is balance due on same of \$7,100. If bank forecloses their chattel mortgage, we are satisfied the assets will not bring enough on forced sale to pay the mortgage. We have friends who will give assistance to enable us to go ahead and finish up stock on hand, and we believe we can save a thousand dollars out of it for creditors, and continue the business. This assistance we can only get on condition we can compromise our debts and save the business. Our unsecured indebtedness is \$7,091.72, and we figure we can pay 15 cents on the dollar if we get the assistance. We send this statement to each of our creditors, and, if the same is accepted by all before the 15th day of January next, we will pay the 15 per cent. on or before February 1, 1898. We are willing any creditor or committee of creditors come here and investigate our affairs. If this offer is accepted, please sign and return inclosed sheet, filling in amount of your claim.

“Yours,

“KOMPASS & STOLL.”

Defendant also testified that he had heard that a man by the name of Imhoff was intending to bring replevin for some lumber; that he (defendant) then procured a copy of the chattel mortgage given to the bank, and took it to his attorney. On defendant's direct examination, he testified, in response to a question asked him by his attorney:

"I left the whole thing to you; didn't make any plan; it was your plan. * * *

"Q. I told you to sign that affidavit?

"A. Yes, sir. * * *

"Q. You did that because I told you to?

"A. Yes, sir."

On cross-examination defendant testified that he authorized and ratified everything his attorney did.

The attorney for defendant testified:

"I was kept advised from time to time by telephone by Mr. Ferguson, the sheriff, as to what was going on. Whatever Mr. Ferguson did at Niles he did under my instructions. * * * It was by my authority that the factory was shut up and kept shut. I didn't order the attachment of \$4,000 worth of stuff. It was to take it all, every single thing there, except exemptions; take every other thing he could find there, without regard to the value of it, to compel the payment of the debt. I had a homely idea that possibly they might pay; if they didn't pay, they would resort to replevin. I thought of the question of the dissolution of the attachment. I thought it would go through the ordinary way; the circuit judge would have other business than to sit and try the case as commissioner. Inasmuch as there was a circuit court commissioner at Niles, it would be before the circuit court commissioner, and, if it was adverse, we could appeal to a jury of Berrien county, so we could hold the attachment on the property. My idea was to get the money. I don't know whether I said at Niles that, if it was brought before a commissioner, we would have held it there until we got our judgment; I would have done so, whether I told you so or not. I didn't believe there would be any proceedings to dissolve the attachment. I thought, if the money wasn't paid, the remedy would be replevin by the bank, because I made up my mind, if the bank insisted that the mortgage was a good mortgage, they would have the manhood to assert it in a court of law. Mr. Light was able to pay the damages. We were unable to show by a fair preponderance of the evidence, to the satisfaction of the court, that the mortgage was fraudulent. The burden of proof was upon us. In a replevin suit the burden was upon the other fellow to show it was good; that is what I figured on; if the evidence was equally balanced, we would win."

The defendant also testified that he thought if he took everything plaintiffs would settle up. He further stated that his attorney told him to hurry up, and get there before Imhoff could bring replevin. The only reason given by defendant or his attorney for believing that the mortgage to the bank was fraudulent was because it was too large for the amount of the indebtedness. No proof was made in the case that the mortgage was not given for the actual amount of the indebtedness, and neither of these witnesses testifies to any fact or circumstance which came to his attention before the attachment was issued which in the slightest degree had a tendency to show that the mortgage was fraudulent. It appears that they made no inquiry about it, saw none of the officers of the bank, and made no inquiry of Kompass & Stoll. The only reasons given by the attorney for thinking the mortgage was fraudulent were the following:

"It was not the Imhoff matter alone that made me think the mortgage was fraudulent. Taking the mortgage and the letter [the letter written by plaintiffs to defendant, above set forth], and the other mortgage, and the fact that Johnson held the other mortgage for \$7,800, to be paid \$50 per month, without interest, and there ought to have been paid on it something like \$1,300, and only \$700 paid on it, according to their letter. From my understanding of the law, the bank could not hold real-estate security. The title to that first mortgage was actually in the bank; that is, the loan was made by the bank, and the mortgage was actually the bank's. I thought the bank would bring replevin."

It appeared that the title to this first mortgage was in Mr. Johnson, and not in the bank. There was no claim but that this real-estate mortgage was *bona fide*.

There is no evidence in this record tending to show probable cause for issuing the writ of attachment. Where the facts are undisputed, probable cause is a question of law, to be determined by the court upon the facts of the case. *Le Clear v. Perkins*, 103 Mich. 131 (26 L. R. A. 627); *Israel v. Brooks*, 23 Ill. 575; *Cloon v. Gerry*, 13 Gray, 201.

But it is contended by counsel that, the defendant having fully and fairly placed all the facts before his counsel, and acted upon his opinion, probable cause is established. It is the rule that where one places all the facts before his counsel, and acts upon his opinion, proof of the fact makes a case of probable cause, provided the disclosure appears to have been full and fair, and no material facts are withheld; and this may also disprove malice. *Stanton v. Hart*, 27 Mich. 539; *Perry v. Sulier*, 92 Mich. 75. There is nothing in the present case showing, or tending to show, that the defendant did not place all the facts within his knowledge before counsel; and, under the well-settled rule in this State, the advice given to him by his counsel is a sufficient showing of probable cause.

It is contended, however, by counsel for plaintiffs, that the advice of counsel cannot protect unless it is founded upon facts tending to justify the advice. If this were the rule, we would be led to the conclusion that the facts stated to the attorney did not justify the advice given, and the case should be reversed. But the rule is not limited to that extent. The advice may not be justified by the facts stated, yet if the party takes the advice of counsel after statement is fully made, and acts upon such advice, probable cause is established. That question was very fully and fairly left to the jury under the charge as given.

But, as we have said, the facts upon which the defendant claims to have relied as a justification for suing out the writ do not establish probable cause. The court was therefore in error in leaving that question to the jury. We are unable to say that the jury did not rely upon that part of the charge in finding the verdict they did, rather than upon the fact that the defendant relied upon advice of counsel.

The court properly refused to give the first and second requests to charge. In effect, the court did give the fourth request. We think the third request should not have been given, as there was no such excessive levy, as claimed, as could affect the defendant's rights under the writ.

For the error pointed out, however, the judgment must be reversed, and a new trial granted.

MONTGOMERY, HOOKER, and MOORE, JJ., concurred with LONG, J.

GRANT, C. J. I concur in the conclusion reached by my Brother LONG. I am, however, of the opinion that there was no question of fact for the determination of the jury, except the amount of damages sustained by the plaintiffs. Neither the defendant nor his attorney had any facts before them sufficient to justify either in making an affidavit that he had good reason to believe, and did believe, that the plaintiffs had assigned, disposed of, and concealed their property with intent to defraud their creditors. The debts secured by the mortgages given by plaintiffs were *bona fide*, and neither defendant nor his attorney made any investigation or showed any reason for believing otherwise. Defendant did not testify that his attorney told him that the facts placed before him were sufficient to justify him in making the affidavit. It would be a reflection upon the intelligence of the attorney if he had done so. In reply to the question by the court, defendant testified:

"I told Mr. O'Hara— I says: 'I don't want to make a botch thing out of this. If you don't think this thing will work, we will not go ahead at all; I will not run the risk.' You talked very favorable that this was all right. I left the whole thing to you; didn't make any plan; it was your plan."

On cross-examination, he testified as follows:

"Q. All you told him up to that time was that there was two mortgages, and they owed you, and they hadn't paid you. He told you to go and get a copy of the chattel mortgage, didn't he?

"A. Yes, sir.

"Q. He gave you no advice at all, did he?

"A. Gave me what?

"Q. Gave you no advice at all?

"A. Not the first day.

"Q. The next day you saw him was the 15th, wasn't it?

"A. I think so; yes, sir.

"Q. What did you tell him on the 15th?

"A. I didn't tell him anything; he done the talking himself.

"Q. What did he say?

"A. Told me the best thing was to get out a writ, and shut the shop down.

"Q. Had you told him anything else between the 6th and the 15th?

"A. Not as I know of.

"Q. He said the best thing to do was to get out a writ, and shut up the shop?

"A. Yes, sir.

"Q. What else did he say?

"A. I don't know.

"Q. Did he say anything else?

"A. Not as I know of."

Defendant further told his attorney that he believed Mr. Kompass to be an honest man. It follows that defendant did not believe him guilty of any intent to defraud his creditors. When two defendants are jointly charged with the fraudulent disposition of their property, the attachment cannot be sustained unless fraudulent action is shown on the part of both. *Cottrell v. Hatheway*, 108 Mich. 619, and authorities cited. I think the record conclusively establishes that both defendant and his attorney sought to force the payment of his claim by seizing all the property of the plaintiffs, shown to be nearly four times the amount of his claim, and by closing up their business, and that neither had any facts before them sufficient to justify any reasonable person in forming a belief that plaintiffs were guilty of fraud.

FERGUSON v. WILSON.

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1. APPEAL—ASSIGNMENTS OF ERROR—WAIVER—BRIEFS OF COUNSEL.

Assignments of error not mentioned in appellant's brief will be treated as waived.

2. SAME—FORM OF BRIEF—COURT RULES.

The nonobservance of Supreme Court Rule No. 40, prescribing the contents and arrangement of appellant's brief, is criticised.

3. SUITS—ABATEMENT AND REVIVAL—FORMAL ORDER.

The fact that an order reviving a suit in the name of plaintiff's administrator was signed by the attorneys, instead of by the court, is immaterial, where defendant afterwards pleaded the general issue without raising the objection, and, from the showing made, the court would have granted the order as of course.

4. CHATTEL MORTGAGES—AFTER-ACQUIRED PROPERTY.

A chattel mortgage securing the payment of a specified sum annually for a number of years, which covers specified chattels, and provides that it shall also cover "all other personal property that may be owned or acquired during such years," is void, as to subsequent good-faith purchasers or attaching creditors, so far as it attempts to create a lien upon after-acquired property having no connection with that owned by the mortgagor at the time of the giving of the mortgage.

Error to Sanilac; Beach, J. Submitted October 25, 1899. Decided December 2, 1899.

Trover by James F. Ferguson, administrator of the estate of Charles Ferguson, deceased, against Henry W. Wilson. From a judgment for plaintiff, defendant brings error. Affirmed.

F. E. Burton and *E. C. Babcock*, for appellant.

C. F. Gates and *D. S. McClure*, for appellee.

122 MICH.—7.

LONG, J. There are twenty assignments of error in this case. None of them are, however, mentioned in the brief of the appellant, except, perhaps, two. The ones not mentioned will be treated as waived, under the rule in *Black v. Dawson*, 82 Mich. 485. Supreme Court Rule No. 40 provides that the appellant, in his statement of facts, and distinct from the argument, shall state the errors upon which he relies, the questions involved, and the manner in which they are raised. This rule was adopted to save the time of the court in going through voluminous records to ascertain the questions involved and the errors relied upon, by putting this burden upon counsel for appellant. It is observed that many of the attorneys do not live up to this rule in full, as they very frequently mix up the facts with arguments and their conclusions drawn from the facts. No attempt has been made by appellant in this case to follow this rule. While we shall examine the case and determine the questions which we think are involved, it must not be taken as a precedent for future cases.

This suit was brought in trover by the administrator of the estate of Charles Ferguson, deceased, to recover the value of certain personal property. The cause was tried by a jury, who returned a verdict in favor of plaintiff. Defendant brings error.

1. It is contended that it developed on the trial, for the first time, that the plaintiff was acting as administrator for Charles Ferguson. From what we gather from the record, it appears that the suit was commenced in the lifetime of Charles Ferguson; that after his death it was revived in the name of his administrator, and a new declaration filed, to which the defendant pleaded the general issue only. The record shows the proceedings from the probate court appointing the plaintiff as administrator. While the order that the suit be revived in the name of the administrator appears to have been made and signed by the attorneys in the case, and not by the court, it is not shown that any objection was taken to the form of it when

the declaration was filed, but that a plea of general issue was filed. On the trial, when the plaintiff sought to make his case, the objection was first made that the testimony could not be received because the suit had not been revived. This was overruled. While the order should have been signed by the court or entered in the court journal, instead of by the attorneys and entered in the book of common rules, yet there was no error in overruling the objection. It was shown by the records that Charles Ferguson had deceased, and that the plaintiff had been appointed administrator; and the order was one which the court would have granted, of course, upon this showing. The case will be treated as though the court had then and there granted the order.

2. Plaintiff's claim to the property in controversy arises :

1. Under a certain chattel mortgage given by one George Wiggins to Charles Ferguson, plaintiff's intestate, on November 1, 1893, and filed in the town clerk's office, November 6, 1893, the consideration mentioned being \$150, and covering one bay horse, one gray horse, one binder, one mower, five yearlings, and one calf.

2. Under a chattel mortgage given by Wiggins to Charles Ferguson, October 27, 1893, and filed in the town clerk's office, November 6, 1893, covering all the crops and stock raised on the farm let by Ferguson to Wiggins on that day, and also all the stock, sheep, cattle, hogs, horses, tools, and machinery that might be used or kept on said farm. This chattel mortgage is contained in a lease given by Ferguson to Wiggins for the farm, and to secure the rent thereof.

3. Under a bill of sale of all the property described in the two mortgages above mentioned, given by Wiggins to Charles Ferguson, and dated November 6, 1895.

The defendant claimed under a chattel mortgage given by Wiggins to him on February 6, 1893, to secure the payment of \$380, payable \$50 each year for six years, and \$80 seven years from date, with interest at 7 per cent. This mortgage covered the binder claimed by plaintiff to be covered by his mortgage and bill of sale, and certain cattle, sheep, crops on the farm, etc.; and also provided

that it should cover "all crops, of whatsoever name or nature, to be sown, planted, and grown on said premises during the years 1893 to 1899, inclusive, also all the increase of the above-described stock, and all other personal property which I may own or acquire during said years." This mortgage was prior in time of filing to the mortgages given by Wiggins to plaintiff's intestate, and was duly recorded in the town clerk's office, and renewed from year to year.

The real controversy between the parties arises over the interpretation of the clause in defendant's mortgage, "and all other personal property which I may own or acquire during said years." It appeared that Mr. Wiggins was the owner and was in possession of the property described specifically in the mortgage given by him to the defendant. The court instructed the jury substantially that, as to the articles of property specifically mentioned in his mortgage, there could be no question as to defendant's right and title, but that defendant could not claim a lien under the general clause, "and all other personal property which I may own or acquire during said years," upon the property afterwards acquired, and having no connection with the property owned by him at the time of the giving of the mortgage. It is this last part of the charge of which counsel for defendant complain, their contention being that defendant's mortgage was a lien upon all of the after-acquired property. It is conceded by counsel for plaintiff that it is settled in this State that one may mortgage after-acquired property, and the mortgage will be upheld; but it is contended that this rule does not apply to goods and chattels subsequently acquired which have no connection with property actually in existence at the date of the mortgage. This was undoubtedly the view taken by the court below. The general rule in many of the States is that at common law a mortgage can operate only on property actually in existence at the time of giving the mortgage, and then actually belonging to the mortgagor, or potentially belonging to him as an in-

cident of other property then in existence and belonging to him; that a mortgage on goods which the mortgagor does not own at the time of making the mortgage, though he may afterwards acquire them, is void in respect to such goods, as against subsequent purchasers or attaching creditors; and the rule in Massachusetts and Missouri and some other States is that, if a mortgage be made of a stock in trade, it will not at law cover additions afterwards made to the stock, though it be expressly framed to cover additions to the stock intended to be made to replace such as should be sold. *Barnard v. Eaton*, 2 Cush. 294; *Gregory v. Tavenner*, 38 Mo. App. 627. Cases from other States might be cited where the same rule is laid down. In this State, however, it has many times been held that a mortgage on a dealer's stock may be made to cover after-acquired goods; but it is held that they must be brought within its descriptive words, and a mortgage drawn to cover goods to be "added to" the stock, or gotten "for use" in the business, will not include goods bargained for, but never received at the place of business, or which, on being received, are devoted to some other purpose. *Curtis v. Wilcox*, 49 Mich. 425.

In *Eddy v. McCall*, 71 Mich. 497, the property in question covered by the chattel mortgage was certain horses, wagons, etc., and certain mill machinery, lumber, shingles, posts, and other materials in and about the planing mill of the mortgagors. The mortgage contained the following clause:

"And also all such other lumber, stock, or material of every kind which they may hereafter add to said business, and all other property which they may hereafter purchase and use in connection with said business."

The property was attached by a creditor, and the mortgagee brought trover. It was held that the clause in the mortgage was valid, even as against third parties; citing *Gay v. Bidwell*, 7 Mich. 525; *People v. Bristol*, 35 Mich. 29; *Cadwell v. Pray*, 41 Mich. 307; *American Cigar Co. v. Foster*, 36 Mich. 368; *Curtis v. Wilcox*, 49 Mich. 425; *Leland v. Collver*, 34 Mich. 418.

In no case, however, has this court held that a clause in a chattel mortgage like the one in the present case, to wit, "and all other personal property which I may own or acquire during said years," creates a valid lien upon after-acquired property not connected with the business in which the mortgagor was engaged, as against subsequent good-faith purchasers or attaching creditors, whatever may be the rule as between the parties themselves. The property in controversy here had no relation to that in possession of the mortgagor at the time of giving the mortgage. He did not then own the property, but afterwards acquired it, outside of the business in which he was then engaged. The case is not like the case of *Eddy v. McCall*, *supra*, nor like the case of *Dunn v. Michigan Club*, 115 Mich. 409. In the last case it appeared that the mortgage covered all the mortgagor's stock in trade, all book accounts, notes, etc., owned by him or appearing on the books of said business then being conducted by him, "and all future book accounts representing proceeds of sales of goods in mortgagor's stock, and all additions to the same." It was held that this covered all future book accounts, though not entered on the books.

The court below was not in error in the charge as given. The judgment must be affirmed.

The other Justices concurred.

SALTMARSH v. CHICAGO & GRAND TRUNK RAILWAY CO.

1. TROVER—CONVERSION OF RAILROAD TIES—MEASURE OF DAMAGES.

Where, in an action of trover, it appeared that plaintiff and defendant had each contracted with a logger and sawyer for the delivery of a specified number of railroad ties, and that defendant had paid the seller for, and appropriated to his own use, ties manufactured from plaintiff's logs and delivered upon plaintiff's contract, the value of the ties, and not of the logs before they were made into ties, was the proper measure of damages.

2. NEW TRIAL—ARGUMENT OF COUNSEL—MISSTATEMENT OF EVIDENCE—FAILURE TO OBJECT.

An application for a new trial on the ground that plaintiff's counsel misstated the evidence in his argument to the jury is properly denied, where no objection was made at the time by defendant's counsel, and their failure is sought to be excused only on the ground that they were not themselves sure that the language complained of was a misstatement.

Error to Ingham; Person, J. Submitted October 25, 1899. Decided December 2, 1899.

Trover by John F. Saltmarsh against the Chicago & Grand Trunk Railway Company. From a judgment for plaintiff, defendant brings error. Affirmed.

L. C. Stanley (*E. W. Meddaugh* and *Geer & Williams*, of counsel), for appellant.

F. S. Porter, for appellee.

MOORE, J. The plaintiff obtained a judgment in an action of trover against defendant for the value of nearly 1,000 railroad ties. There was no dispute about the defendant having received and converted the ties to its own use, but its defense was that it bought them of George Pope, who had a right to sell them, and paid him for

them. The record discloses that prior to January, 1894, the plaintiff was the owner of a portable sawmill, which he had leased to his son, John A. Saltmarsh, and George Pope, who in February, 1894, moved the mill upon land owned by Hiram Smith, adjoining land owned by the plaintiff. It is the claim of plaintiff that upon his own land was timber suitable for ties, sufficient to make twelve or fifteen hundred of them. It is also his claim that young Saltmarsh and Pope bought of Mr. Smith, for the sum of \$150, timber suitable for making ties. He claims Saltmarsh and Pope were indebted to him for the rent of the mill, and agreed to make for him 2,000 ties, and deliver them upon the right of way of defendant. February 15, 1894, plaintiff made a written contract with defendant to deliver to it, upon its right of way, 2,000 ties. It is the claim of plaintiff that, prior to March 23d, young Saltmarsh and Pope had paid Smith some money, and had sawed him 40,000 feet of pine, to apply on their timber purchase, and at the same date had delivered on the right of way of defendant, for plaintiff, upwards of 300 ties. On the 23d of March the partnership between young Saltmarsh and Pope was dissolved, and one formed between Pope and George Klotz. It is the claim of plaintiff that Pope and Klotz succeeded to the rights of Saltmarsh and Pope in the Smith timber and the mill. On March 23d the plaintiff made a contract with the new firm to cut and deliver to him, on the right of way of the defendant, 2,000 ties, 500 of which were to be delivered every 15 days, until all of them were delivered. It is his claim that, early in May, 957 of these ties had been delivered on the right of way for him, and it is these ties which are in controversy. It is the claim of defendant that the Smith timber was bought by Pope, and that Pope rescinded the contract with the plaintiff in April. On the 2d of May Pope entered into a contract with the defendant, in his own name, to furnish it 2,000 ties. The 957 ties in dispute were received by the railroad company, who on June 27th paid Pope for them. All of these ties were cut by the

mill operated by Pope and Klotz, and it is the claim of the plaintiff that he had no knowledge of such a contract until the day Pope was paid for the ties. The plaintiff testified he had no knowledge of this contract, and Klotz also testified he had no knowledge of it, until the 27th of June. A second 1,000 ties were made and delivered by Pope and Klotz to defendant. Both the plaintiff and Pope claimed title to these ties, and the defendant declined to take them until both consented in writing that it might do so and pay the money to Mr. Sturgis, a justice of the peace. This was done, and the title to those ties is not in controversy here. All of the ties were cut by the mill originally owned by the plaintiff. The respective parties gave testimony tending to support their claims. The testimony was very contradictory. The circuit judge gave a very long and careful charge to the jury, who returned a verdict in favor of the plaintiff.

Many assignments of error are made and discussed, which we do not think it would be profitable to discuss in this opinion.

Counsel say in their brief that the purchase by Pope of the Smith timber is one of the salient points of the defense, and is not disputed. Counsel are in error in this. The testimony and some of the established facts in the case indicate that the purchase of this timber, while made by Pope, was for young Saltmarsh and Pope, and was in large part paid for by them, and that Pope and Klotz succeeded to their rights in it.

It is claimed the contract was for 2,000 ties, and was never completed, and that plaintiff could not be deemed to have accepted any of the ties until they were marked by the number of his contract, and that the court erred in his instruction to the jury in relation to delivery. The contract did not provide the title should not pass until the ties were marked. It did provide where they should be delivered, and that 500 of them should be delivered every 15 days. Without going into detail, it may be said the charge of the court upon that feature of the case was quite as favorable to the defendant as it was entitled to have it.

Complaint is made because the court charged the jury that the measure of damages to which plaintiff would be entitled should be the value of the ties, and not the value of the logs before they were made into ties. Before there was any delivery of this timber upon defendant's right of way, it was manufactured into ties. When the title passed to the plaintiff by the delivery upon defendant's right of way, he became the owner of the ties. They were afterwards converted to the use of the defendant. If the plaintiff was entitled to recover at all, the measure of damages was correctly stated by the learned judge.

After the judgment a motion was made for a new trial, —among other reasons, because counsel for plaintiff had improperly stated the testimony in his argument to the jury. This motion was based upon the affidavit of the court stenographer, which affidavit was controverted by the affidavit of the attorney. The circuit judge overruled the motion. He finds that the counsel used the language as testified by the stenographer. He also finds the argument of the counsel was not objected to at the time it was made, and was of the opinion that no harm was done by the argument. Counsel seek to excuse their failure to call the attention of the court and counsel to the misstatements made in the argument by the fact that they were not able to get a statement from the stenographer earlier than the attorney was misstating the evidence. If the recollection of the counsel as to the evidence was so faulty they could not rely upon it sufficiently to call the attention of the counsel and court to the fact, not very much blame can attach to opposing counsel for not correctly remembering it. Counsel heard the argument of the attorney for the plaintiff. They made no claim to either the court or counsel that the argument was an improper one. They cannot remain silent, as we have repeatedly said, under such circumstances, until a verdict is rendered against their client, and then use the improper argument as a basis for a new trial.

Judgment is affirmed.

The other Justices concurred.

GORDON v. ALEXANDER.¹

1. INSOLVENT DEBTORS—SALE OF STOCK—CONSIDERATION.

Where demand negotiable notes were given for the sale of an insolvent's stock, and the buyer paid a debt of the insolvent, on which he was liable as surety, it cannot be said that the sale was without consideration.

2. SAME—REQUESTS TO CHARGE—FRAUD.

A request to charge which assumes the existence of fraud on the part of an insolvent in the transfer of his stock of goods is properly refused, where there is evidence from which the jury might find that the transfer was in good faith.

3. TRIAL—REFUSAL OF INSTRUCTIONS—HARMLESS ERROR.

Refusal to give an instruction to which appellant was entitled will not warrant a reversal, where the verdict, viewed in the light of the general charge, shows that the refusal worked no harm to the appellant.

Error to Sanilac; Beach, J. Submitted October 25, 1899. Decided December 2, 1899.

Trover by James G. Gordon against Joseph C. Alexander. From a judgment for plaintiff, defendant brings error. Affirmed.

Bacon & Palmer, for appellant.

J. S. Crandell and *W. H. Burgess*, for appellee.

MOORE, J. Plaintiff sued defendant in trover. The declaration contained a count claiming special damages for injury to his business and credit because defendant unlawfully took his goods from him. He recovered a judgment of upwards of \$1,800. The charge of the court contains a statement of the claims of the respective parties, and is as follows:

"Previous to November 12, 1891, Alexander McDonald

¹ Rehearing denied April 3, 1900.

had been engaged in the mercantile business at Tyre, in this county,—general merchandise. At that date he was largely indebted, and on that date he made a sale of his entire business to the plaintiff in this case. On that sale nothing was paid down by the plaintiff, who bought of McDonald, but notes were given by Gordon, the plaintiff, and taken by McDonald as a consideration for that purchase. It appears from the undisputed testimony that those notes were payable on demand, which fact made them payable immediately, and that Gordon went into possession of the business and the stock of goods; that some time in March, 1892, Allan Shelden, a creditor of McDonald, procured an attachment from this court, and attached and took possession of the entire stock in Gordon's possession, and afterwards made a sale of it, and closed out the stock and business. Now, this action is brought by Mr. Gordon, as plaintiff, claiming that he was the actual, *bona fide* owner of that stock of goods, and that he is entitled to recover in this action. His claim is, the value of that stock of goods, as being the owner, and having been wrongfully deprived of them.

“Now, the defense meet that claim of ownership by this claim,—that the sale by McDonald to Gordon was a fraudulent sale; and they make the particular claim that it was made with the intent to hinder and delay McDonald's creditors in the collection of their debts. They claim that, so far as Gordon's purchase was concerned, it was not a *bona fide* purchase, within the law, because there was no actual consideration paid, as they claim; the consideration being evidenced by notes, simply. The defendant claims that the facts and circumstances concerning the transaction were such as to indicate that the transfer was fraudulent on McDonald's part, at least; and they also claim that it was fraudulent so far as Mr. Gordon was concerned. They claim that he had notice from the facts and circumstances of the conditions under which the sale was made. Now, gentlemen, the first prime question of fact for you in this case is this: Was the sale by McDonald, on McDonald's part, a fraudulent sale? It will not matter, under some phases of the law, whether Gordon knew of that fraud or not, as I shall explain to you hereafter. The first prime question is, What was McDonald's purpose, or what was the effect as to creditors of his acts, under these circumstances? Now, the testimony, as I have said to you, indicates a certain condition of the affairs

of Mr. McDonald at that time,—that he was very largely in debt, in excess of any visible property in the business there; that demand had been made upon him for payment, and that conversations had been had with representatives of the defendant in this case, Mr. Sheldon, and that following these conversations this sale was made; that no money was paid down upon that sale; and that demand notes were taken. From these principal facts, and the facts that the parties connected with the transaction were relatives, and some other circumstances concerning the transaction, it is claimed by the defendant here that the transfer was, in law and in fact, fraudulent.

“Now, I say to you that question of fact is for you to determine. Now, an act may be fraudulent as to creditors when it was not really intended as such,—when there was no direct purpose. For instance, a man may be in business, and may be very largely indebted; he can sell in the ordinary course of business, from his store, all the articles of merchandise which he has, and such a sale is not fraudulent as to creditors, because that is the only purpose of his business. He is there for that purpose, and his creditors presume that he will sell in the ordinary course of business. And a person under these circumstances may close out his entire stock, and clean up the business; and such an act as that may, under some circumstances, be fraudulent as to creditors, because the creditors have relied, presumably, upon his continuing his business, and that he would pay them from the proceeds of the business, as his business went on in the ordinary course of commercial transactions. Now, I say to you, you have a right to take into consideration all these circumstances existing at this time,—the situation in which Mr. McDonald was as to this creditor, the amount of his stock, the relationship of the parties, the pressure of creditors, and any other circumstances which you have in evidence,—and then determine for yourselves the fact as to whether McDonald’s act, of itself, was fraudulent as to these people whom he owed, as putting his visible property beyond the reach of their process, or of delaying or hindering the creditors in the collection of their claims. That is the first question for you to determine. If you find that McDonald’s transactions there in that respect hindered or delayed, or had the effect to hinder or delay, the creditors in the collection of their claims, by putting his visible property out of his possession, then that would

be a fraudulent act, within the meaning of the law. It is for you to say whether it was so, under these facts and circumstances, or not. Now, if you should find that it was not fraudulent on McDonald's part, then you will find a verdict here for the plaintiff.

"If you find that it was fraudulent on his part, then there would be other questions for you to determine, as to the amount,—whether any recovery can be had or not. If you find that it was fraudulent, and that his stock was subject, under the law and under these instructions, to the attachment, then there would be the other question, as to whether Gordon had notice of McDonald's purpose in the disposition of this stock. If Gordon knew—had knowledge—that McDonald's purpose was fraudulent, then he cannot recover anything in this case. But, if he didn't have knowledge that the sale was fraudulent on McDonald's part, then he would be entitled to recover back such sum as he had actually paid, less what he had received from the property. Now, there may be some difficulty in arriving at that amount, under the testimony here, but you are to take the testimony as near as you can get at it, if you find that Gordon did not have any notice or knowledge of the fraudulent purpose, and determine what he is entitled to. His testimony is that he paid \$608 in money after the sale on the transaction, and that he retained of the property which he received some personal property. You will recollect that from the testimony. It is apparent that he must have made some sales from November to March. It is left in very great doubt what the amount is, but you have the two inventories, and, from all the facts that you may have there, you may determine, under this phase of the case, the probabilities. You are not required to arrive at that with actual, definite certainty, if you don't have the testimony, but what are the probabilities as to the amount he has had out of that transaction.

"*Mr. Burgess:* And take into consideration the stock afterwards purchased and put in, and the horse and buggy and harness that he sold?

"*Court:* Yes.

"*Mr. Crandell:* I suppose, interest on the amount at 6 per cent. from March, '92?

"*Court:* Yes; to date.

"One further proposition, perhaps, in relation to these notes,—in determining whether a valuable consideration

was paid or not. Those demand notes, as I say to you, were due immediately, being made upon demand. If there had been a transfer to Mr. McDonald's brother the same day, they would have still been due, and past due, in the hands of the purchaser; so that Gordon, whenever he was attacked upon that sale, could protect himself against those notes in the hands of anybody. They were past due. You may take that into consideration in determining the character of the consideration paid,—whether it was valuable consideration, and whether he has been injured in the transaction otherwise than the payment of the actual money which he has paid upon the transaction."

On the trial the plaintiff was allowed to state what his credit was before his goods were taken, and how it was afterwards. It is claimed this was error, as the measure of damages was the value of the property, with interest, at the time it was taken; counsel citing 2 Greenl. Ev. § 276; *McGuire v. Galligan*, 57 Mich. 38; *Woods v. Gaar*, *Scott & Co.*, 93 Mich. 143. I do not think these authorities sustain the contention of counsel, but, on the contrary, they recognize that where special damages are the direct result of the unlawful taking of the property, if they are alleged and proved, they may be recovered. See *Wait v. Kellogg*, 63 Mich. 138. The other justices are of the opinion it is unnecessary to discuss or determine this question, because, if it was error, the charge of the court and the verdict of the jury eliminated it. The case was submitted to the jury upon the sole theory that the value of the property seized was the measure of damages, and it is evident that the jury followed the instruction.

The defendant requested the court to charge the jury as follows:

"1. Under the undisputed evidence in this case, your verdict should be for the defendant.

"2. It appears from the undisputed evidence that, at the time Alexander McDonald sold this stock of goods, he was largely indebted to Allan Sheldon & Company and other creditors, and that the plaintiff did not pay a valuable consideration for the same, but gave his notes for the purchase price, and under those facts the plaintiff would not be a *bona fide* purchaser, and, if Alexander Mc-

Donald intended to defraud his creditors by the sale of this stock to Gordon, such sale would be void, even if Gordon had no knowledge of such fraud.

"3. If the sale of this stock of goods by Alexander McDonald to plaintiff had the effect of hindering or delaying his creditors, such sale would be fraudulent as to McDonald's creditors, and, the plaintiff not having paid value for the stock, he is not a *bona fide* purchaser; and your verdict should be for the defendant.

"4. Under the undisputed facts in this case, plaintiff can, in any view of the case, recover from the defendant only the amount he had actually paid for the stock, less the amount which he had received from the sale of the horses, buggies, harness, and other goods; and the burden is on the plaintiff to show such amount.

"5. It appears from the testimony of the plaintiff that he has only paid the sum of \$608 on the purchase price of the stock of goods and other property which he purchased from McDonald. It also appears from his testimony that he has disposed of the horses, harness, and buggy; that he continued to carry on the business and sell from the stock of goods from November 12, 1891, to March 20, 1892; and, under the undisputed facts in this case, the burden is on the plaintiff to show that he did not receive from such sales a sufficient amount to reimburse him for the sum paid by him on the purchase price; and, the plaintiff not having furnished any evidence from which the amount of such sales can be found, your verdict must be for defendant.

"6. The plaintiff was not a creditor of McDonald, but a purchaser; and, if he had knowledge of facts sufficient to put an ordinarily prudent man on inquiry, such knowledge on the part of Gordon would be sufficient to avoid the sale, without any active participation in the fraud by him.

"7. It appears from the plaintiff's testimony that the paper given by him for the stock of goods was dated the 12th of November, 1891, and was payable on demand, and that such paper has not been paid or renewed in any manner, nor has any suit or proceeding been commenced to collect the same; and I charge you that such paper is barred by the statute of limitations, and is not a valid claim against the plaintiff."

These requests were refused, except as covered by the general charge. The refusal is said to be error. The

first five and the last one of these requests could not be given by the court, under the evidence introduced by the plaintiff. He claimed that he made the purchase of the goods in good faith, without any knowledge of any intention on the part of Mr. McDonald to defraud his creditors, or that the fact of the sale would defraud his creditors. His claim was that, prior to the purchase, he had indorsed Mr. McDonald's note for \$300, and as part of the consideration for the purchase he assumed the payment of that note, and afterwards did pay it. He also claims that for some years Mr. McDonald was in partnership with his brother in this same business; that Mr. McDonald and his wife purchased the one-half interest of the brother in the business in August, 1887, for which they gave their notes, some of which were unpaid at the time the plaintiff bought the stock of goods; and that, to apply on this indebtedness, the notes plaintiff gave to apply on the purchase were turned over to the brother, who released Mr. and Mrs. McDonald for a like amount of their indebtedness to him, and after the notes were turned over he had paid on them \$308, and promised to pay the balance when this litigation was ended. The brother also claimed that plaintiff had written him, promising to pay the notes as soon as he could. Plaintiff gave testimony tending to prove his claim. The law does not prohibit honest sales of goods upon credit, even though the seller is in debt at the time. It cannot be said that the giving of negotiable notes was not a sufficient consideration for a sale, and it is very clear that a part of the purchase price was paid by plaintiff. *Dixon v. Hill*, 5 Mich. 404; *Lewis v. Rice*, 61 Mich. 97; *Wait v. Kellogg*, 63 Mich. 138. These requests, except the sixth one, assume certain facts to exist, when there is evidence from which the jury might make a different finding. Under such circumstances, they should not be given. *Lewis v. Rice*, 61 Mich. 97.

The plaintiff did not claim upon the trial that, when he made the purchase of the stock, he was a creditor of McDonald. This being so, defendant was entitled to have

his sixth request given. *Hough v. Dickinson*, 58 Mich. 89; *Bedford v. Penny*, Id. 424; *Allen v. Stingel*, 95 Mich. 195. But, in view of what follows, we think the refusal to give the request worked no harm to defendant. A reference to the general charge of the judge shows that the jury were instructed that, if Gordon knew McDonald's purpose was fraudulent, he could recover nothing, but, if he did not have knowledge it was fraudulent, if it in fact was fraudulent, he would be entitled to recover such sum as he had actually paid, less what he had received from the property. The judge called the attention of the jury to the fact: "His testimony is that he paid \$608 in money after the sale on the transaction, and that he retained, of the property which he received, some personal property." There was no claim plaintiff had actually paid, at the time of the trial, of the purchase price, more than this amount. The jury returned a verdict in favor of plaintiff of \$1,834. The inventory made at the time the property was attached by the sheriff shows it was appraised at \$1,827.93; so we think it clear the jury could not have returned the verdict they did, without finding the sale by McDonald was not fraudulent. This being so, it is evident the giving of the sixth request would have made no difference with the verdict. The plaintiff insisted the sale by McDonald was not a fraudulent sale. The defendant averred it was a fraudulent transaction. Each gave testimony tending to support his claim. The weight of the evidence so given was for the jury. *Lewis v. Rice*, 61 Mich. 103; *Redpath v. Brown*, 71 Mich. 258; *Cortland Manfg. Co. v. Platt*, 83 Mich. 419; *Ferris v. McQueen*, 94 Mich. 367.

A motion was made for a new trial, based upon the errors assigned in the case as it is now here. The motion was overruled. There is nothing in the record that makes it our duty to overrule the action of the circuit judge in disposing of this motion.

Judgment is affirmed.

The other Justices concurred.

REYNOLDS v. LEVI.

BREACH OF CONTRACT—DAMAGES.

Plaintiffs, having contracted to put down a drive well for defendant—a well that defendant could not pump dry—at a specified price per foot, and having made four borings, and abandoned each because of obstructions, cannot, when prevented by defendant from proceeding with a fifth boring, recover, as part of their damages for breach of contract, the cost of the four unsuccessful borings.

Error to Sanilac; Beach, J. Submitted October 25, 1899. Decided December 2, 1899.

Assumpsit by Dwain Reynolds and William N. Rogers against Edward Levi for breach of a well-drilling contract. From a judgment for plaintiffs for less than the amount claimed, they bring error. Affirmed.

F. E. Burton, for appellants.

C. F. Gates and *D. S. McClure*, for appellee.

MONTGOMERY, J. The case made below, as stated by the plaintiffs and appellants, was as follows: On or about October 1, 1894, plaintiffs were the owners of a well-drilling machine, and were engaged in the business of drilling farm wells in the vicinity of Marlette, Sanilac county. Defendant was the owner of a farm near Marlette, upon which he did not live at the time. The parties entered into a verbal contract, under the terms of which plaintiffs were to put down a drive well on defendant's farm,—a well that defendant could not pump dry,—for which defendant agreed to pay plaintiffs \$1.25 per foot. Plaintiffs commenced work, and, after going down about 100 feet, struck shale rock, and got "hung up." Defendant was present at this time, and designated a new place for plain-

tiffs to drill, and also designated another place for plaintiffs to drill in case they got "hung up" in the second hole. Plaintiffs made a new boring at the place designated by defendant, and, after going down about 60 feet, met with another obstruction, and had to pull out. Plaintiffs then made an arrangement with defendant to go away for a time to do other work, and to return and start a third boring, and to board themselves on their return. Plaintiffs returned in the spring of 1895, and made the third boring, going down about 70 feet, and, meeting with another obstruction, made a fourth boring in the vicinity designated by defendant, going down about 100 feet, when another obstruction was met; whereupon the parties made an agreement whereby the plaintiffs were to have time to get special tools with which to complete the work. Immediately upon obtaining the tools and the completion of the jobs on hand, per agreement with defendant plaintiffs proceeded to make another boring, and, after going down about 40 feet, were stopped by defendant. Under the charge of the court, recovery was limited to the last boring, for which plaintiffs received a verdict of \$15.

The plaintiffs offered no proof of the damages sustained by the breach of the contract by defendant, except as the cost of the work in the effort to find water bears on the question. The plaintiffs contend that the value of labor expended is the proper measure of damages. We do not consider this position tenable. The award of damages for a breach of contract is for the purpose of compensating the nondefaulting party for the injury sustained. It is apparent that, up to the time when the plaintiffs attempted the last boring, the labor which they had expended, and which, according to their present claim, amounted to nearly \$250, had been expended in vain. No part of its cost could have been recovered if they had completed the contract. Why, then, should they recover it now, unless, instead of compensating them for the injury which they sustained by the breach, they be permitted to recover a sum which has no true relation to the damages sustained,

but operates rather by way of punishment to the defendant? It is none the more to be considered as compensatory because it happens to be a sum equal to the cost to them of work which before the breach proved unavailing. Had the plaintiffs shown loss of profits in putting down the well on which they were at work, a different question would have been presented.

The judgment is affirmed.

The other Justices concurred. ,

HORNER v. CITY OF EATON RAPIDS.

1. MUNICIPAL CORPORATIONS — ELECTRIC LIGHTING — USE OF STREETS.

The fact that individuals, after obtaining a contract from a city to light by electricity certain of the public streets, are permitted, without protest, to light a few private business houses along the line of such streets, will not entitle them, when, at the expiration of their contract, they are directed by the city to remove their poles and fixtures, to set up rights in the streets based upon the private lighting.

2. SAME—CHARTER PROVISIONS—EASEMENTS.

A charter provision giving to the common council of a city the right to provide for the public lighting of the streets confers no power on the council to grant a perpetual easement in the streets for the maintenance of poles and wires for use in private lighting.

Appeal from Eaton; Smith, J. Submitted October 25, 1899. Decided December 2, 1899.

Bill by Charles S. Horner and Edward E. Horner to restrain the city of Eaton Rapids from removing from the streets complainants' electric-light poles and fixtures. From a decree for complainants, defendant appeals. Reversed.

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s126	52
122	117
s80W	1012
122	117
s80W	1012
130	1 22
122	117
144	10

Complainants, in 1888, owned a water-power in the defendant city, with which they operated a woolen mill. The population of the city was about 2,000. The records of the common council for April 24, 1888, show the following:

"Petition of Horner Brothers, asking permission to set poles and string wires in public streets and alleys, was received and read. A proposition was received from C. S. and E. E. Horner to light the public streets by electric light, arc lights, for the consideration of seventy dollars for the light per year for six or more lights, and to keep same in good condition at their own expense; settlement and payments to be made monthly. Alderman Hamilton moved that the chairman be authorized to appoint a committee to whom shall be referred the proposition of Horner Brothers for investigation. Motion prevailed. Chairman appointed as such committee Aldermen Hamilton, Springer, and West. Motion that the petition of Horner Brothers to set poles and string wire in streets be referred to the city committee. Motion prevailed."

At a meeting on May 8th the committee reported:

"Your committee to whom was referred the petition of Horner Brothers for the privilege of erecting poles in the streets and alleys of the city, upon which to string electric-light wires, have had the same under consideration, and are in favor of allowing the privilege asked for; the poles to be erected under the full direction of the committee on streets. * * * Alderman West moved that Horner Brothers be granted the permission of placing poles and wires in the streets, under the full supervision of street committee, which motion prevailed."

At the same meeting the committee to whom was referred the proposition of complainants to light the streets asked further time for consideration, which was granted. On May 22d the committee reported, recommending a contract to be made with Horner Brothers for lighting the streets, and fixing the location of each light. The report was amended, and as amended adopted. That proposition was not accepted by complainants, and on June 15th, at a special meeting of the council, another resolution was

passed, fixing terms for lighting the city, and providing that, if it be accepted by complainants, a contract should be drawn. A committee was appointed to prepare such contract. The contract was reported June 19th, and ratified. That contract ran for one year. At various times subsequently, petitions were presented for new street lamps. Some were rejected and some granted. Meanwhile contracts had from time to time been executed between complainants and the city for lighting its streets, one of such contracts running for the period of five years. On August 31, 1898, the city, having made a contract with another party for lighting its streets, notified complainants that their contract then existing was terminated, and that they must remove their poles, wires, and lamps within 10 days, and that the new company had been granted permission to erect and maintain its poles and wires in the same places as those which were then in use by the complainants. Complainants thereupon filed this bill to enjoin the city from removing their poles, etc.

Complainants claim that their plant cost them from eight to ten thousand dollars, which includes the cost of the dam and remodeling the flume. They are using the same dynamo which was originally put in. There is no testimony of the value of this plant at the time of instituting the suit. One of the complainants testified that he did not know what it is worth today. There is therefore no evidence of the actual damage which complainants will suffer by being compelled to remove their poles and wires from the streets. They had already removed their lamps, for it appears conceded that their contract with the city was properly terminated. The plant had a capacity for 30 lamps, of which 21 were used in lighting the city when the above notice was served. They had made no extensions except as required by their contract with the city, had never extended their system into the residence portion of the city, and had only lighted a few buildings along the streets used for city lighting. They bought the dynamo, and were preparing to erect their plant, three months

before they had any permission from, or contract with, the city. The lamps for lighting the streets were put in and started before any were used for private lighting. One of the complainants testifies that at one of the meetings of the common council the question of whether they were to have the exclusive right to do commercial lighting, and whether they would install a plant for doing the public lighting alone, was discussed. The case was heard upon pleadings and proofs, and decree entered for complainants, declaring that they had the right to maintain their poles and wires as now existing in the streets, and giving them a perpetual right to use the same.

J. B. Hendee (Huggett & Smith, of counsel), for complainants.

Fred J. Slayton, City Attorney (Russell C. Ostrander, of counsel), for defendant.

GRANT, C. J. (*after stating the facts*). Did the petition, the permission granted by the council, the erection of the poles, the lighting of the city under the several contracts for nearly 11 years, and the use made of them to furnish light to a few private business houses, create a permanent contract between complainants and the city, and give them a perpetual, vested right in the streets? This is the sole question presented. If answered in the affirmative, easements in our public highways can be created in a very loose manner, and rest upon very slight foundations. Complainants had acquired no franchise from the State. Those cases (and many are cited by complainants) holding that where the State has granted to corporations the right to use the public highways for telegraphic and telephonic purposes, and the municipalities, under the authority vested in them, have by general ordinance provided for their erection so as not to interfere with or injure the public, contract relations exist, which the municipalities cannot afterwards take away, do not apply to this case. Complainants have only such rights

as the common council had the power to grant. It is important to determine first just what was granted. Complainants concede that they have no perpetual contract with the city for lighting, and that they have no rights based upon such contracts. If, therefore, the permission granted to erect these poles was granted upon the basis of contracts to light the streets of the city, complainants could be compelled to remove them when such contracts were at an end. They do not claim a right to extend their lines beyond those actually in use, and the decree so limits them. Their claim, therefore, of perpetual, vested rights, must rest entirely upon the proposition that they obtained permission to put in a commercial electric-lighting plant, and that the city lighting was incidental to that. The records of the common council contain not a word to indicate that the proposition was so understood by the council. Public policy requires record evidence of the actions of common councils in municipal matters. They cannot rest in parol. The sole testimony in this case is the loose testimony of one of the complainants that there was a talk before the council about commercial lighting, and their having the exclusive right to do it. Complainants themselves did not understand that they were obtaining vested rights in the streets. Complainant Edward testified: "I never considered it in the light of a perpetual right at all; never claimed to have a perpetual right." Complainants had no contracts with any one prior to the erection of the poles. They undoubtedly erected their plant upon the belief that they would be able to make contracts with the city, and the first lighting was done for the city. That complainants may have intended to do some commercial lighting was no concern of the city, and was not binding upon it. The fact that they stretched other wires along their poles, and extended them into a few business houses, without protest from the city, gave them no rights, nor is it any evidence of what the original contract was. For 11 years they made no extensions except as ordered by the city. We

think it entirely manifest that the common council dealt with the complainants upon no other basis than that of furnishing lights for the city. Their conduct for 11 years renders this conclusion apparent. The furnishing of light to private citizens was merely incidental.

The control of the public highways is in the State, and not in the municipalities. Municipalities have only such control over the streets and highways as is conferred upon them by the legislature, either by express enactment or by necessary implication. In a recent and very carefully-considered opinion, written by my Brother MONTGOMERY, we held that "the power of a municipality to grant an easement in the street to a street-railway company is not inherent, but is derived from the legislature." *Detroit Citizens' St. Ry. Co. v. City of Detroit*, 110 Mich. 384 (35 L. R. A. 859, 64 Am. St. Rep. 350). See, also, *City of Detroit v. Detroit City Ry. Co.*, 76 Mich. 425. When, therefore, private parties claim permanent easements in the streets, they must show clear title. There is no presumption in their favor. The presumption is against them. The right to erect poles in the public highway is as much an easement as the right to lay tracks for a street railway. No authority is found in the charter of the defendant for granting perpetual easements in its streets. The charter provisions relied upon are those giving power to the common council "to control and regulate the setting of awning and other posts and shade-trees in the streets and other public places in said city" (Act No. 347, Local Acts 1881, § 16), and "to provide for the public lighting of said city with gas or otherwise" (Id. § 12). Under these provisions the city undoubtedly had the power to contract with complainants to light the city. *Putnam v. City of Grand Rapids*, 58 Mich. 416; *Attorney General v. City of Detroit*, 55 Mich. 181. But these cases are no authority for granting perpetual easements in the streets under the provisions of this charter. *Stevens v. City of Muskegon*, 111 Mich. 72 (36 L. R. A. 777), does not apply. The improvement by the construction of a sewer

in that case was a permanent one, and was so intended. The public health of the city demanded it. The city had authority to provide for the construction of sewers. There was no contract for its use for a specified time upon payment of a certain amount by the city. The city was relieved from taxation. It received a sufficient consideration for the rights granted to Stevens. *Chicago Municipal Gas Light & Fuel Co. v. Town of Lake*, 130 Ill. 42.

Decree reversed and bill dismissed, with costs of both courts.

The other Justices concurred.

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f135	511

PEOPLE v. ALLEN.

STATUTORY OFFENSES—COMPLAINT—NEGATING EXEMPTION.

A complaint for a violation of Act No. 63, Pub. Acts 1893, § 1, making it unlawful for any person to practice dentistry unless he has received a certificate from the State board of examiners, "provided," that the act shall not apply to "any person who is now located and lawfully in actual practice" in the State, need not negative the exemption contained in the proviso.

Exceptions before judgment from Kent; Adsit, J. Submitted October 26, 1899. Decided December 2, 1899.

Walter L. Allen was convicted of illegally practicing dentistry. Affirmed.

Dunham & Dunham, for appellant.

Horace M. Oren, Attorney General, and *Frank A. Rodgers*, Prosecuting Attorney (*Rodgers, McDonald & Minor*, of counsel), for the people.

HOOKER, J. Section 1, Act No. 63, Pub. Acts 1893, provides:

"It shall hereafter be unlawful for any person to practice dentistry in this State unless such person has received a certificate of qualification from the board of examiners provided by this act: *Provided*, that the provisions of this act shall in no way apply to or affect any person who is now located and lawfully in actual practice in this State."

The defendant was prosecuted under a complaint based upon this section, which contained no allegation that he was not, at the time of the passage of said law, "located and lawfully in actual practice in this State." It is contended that the conviction cannot be sustained, under the cases of *People v. Telford*, 56 Mich. 541; *People v. Pendleton*, 79 Mich. 317; *People v. Haas*, Id. 449. Those were cases where it was necessary to plead exceptions contained in the enacting clause or statute. This is a case where the defendant may have been within an exemption contained in a proviso. The distinction is pointed out in the early case of *Myers v. Carr*, 12 Mich. 71, and recognized and applied in many later cases. *Lynch v. People*, 16 Mich. 472; *People v. Richmond*, 59 Mich. 570; *People v. Phippin*, 70 Mich. 6; *People v. Pendleton*, 79 Mich. 317; *People v. Curtis*, 95 Mich. 212. See, also, *Attorney General v. Oakland County Bank*, Walk. Ch. 90.

Several questions are raised upon the introduction of evidence. Our examination has convinced us that they are without merit, and the testimony admitted was so obviously pertinent that we think it unnecessary to discuss them.

The conviction is affirmed.

The other Justices concurred.

STEPHENS v. LEONARD.

122	125
p122	382
122	125
126	378
126	379
122	125
s80	W1002

1. HUSBAND AND WIFE—DOWER—CONTRACT PURCHASER.

Under 3 Comp. Laws 1897, § 8918, giving the widow dower in all lands whereof her husband was seised of an estate of inheritance at any time during the marriage, a wife is not dowerable in lands held by her husband under contract of purchase, the legal title remaining in the vendor.

2. SAME.

A contract purchaser of land, at whose direction the vendor conveys the land to a third person as security for money to complete payment of the purchase price, is not seised of a legal title, so as to entitle his wife to dower therein.

3. SAME—ALIENATION OF HOMESTEAD—SIGNATURE OF WIFE.

A writing signed by a contract purchaser of land and by his wife, directing the vendor to make the deed to a third person, is effectual to cut off the wife's homestead rights, under 3 Comp. Laws 1897, § 10363, which provides that a mortgage or "other alienation" of the homestead, to be valid, must bear the signature of the wife.

4. MORTGAGES—PARTIAL RELEASE—FORECLOSURE.

Where a mortgage of a homestead and other property, given to secure the payment of eight notes of equal amount, contains a provision that, on payment of the three notes first maturing, the homestead shall be released, the property other than the homestead is alone liable, in case of payment of such three notes, for the balance of the debt; but, if such notes are not paid, the mortgagee may claim the whole as security, and will not be required to release the homestead in case enough should be realized from a sale of the other property to pay the three notes in question.

Appeal from Wayne; Frazer, J. Submitted October 26, 1899. Decided December 2, 1899.

Bill by Albert L. Stephens against Henry R. Leonard and Annie E. Leonard to foreclose a mortgage. From a decree for complainant, defendants appeal. Affirmed.

Wells, Angell, Boynton & McMillan, for complainant.
George W. Radford, for defendants.

MONTGOMERY, J. In 1894 the Leonard & Carter Furniture Company purchased from Thomas T. Leete and wife, on land contract, 30 feet front on Gratiot avenue, Detroit (referred to in the record as the "Gratiot-Avenue Property"). The purchase price was \$40,000, upon which \$5,000 was paid down. The defendant Henry R. Leonard, on the 1st of April, 1890, had bought from the trustees of the Brush estate a lot on Eliot street, Detroit (called in the record the "Eliot-Street Property"), at the price of \$5,830, only \$830 of the purchase price having been paid. The furniture company had erected a building on the Gratiot-avenue lot at a cost of about \$60,000, and Mr. Leonard had built a residence on the Eliot-street property. In February, 1895, Mr. Leonard desired to purchase the interest of the Leonard & Carter Furniture Company, and, in order to raise the money to do so, gave the complainant the securities in question in this case to secure a loan of \$40,000. It appears that the trustees of the Brush estate had assigned the contract for the Eliot-street lot to the State Savings Bank, and had executed a deed running to Leonard, which was left at the bank, to be delivered when the payments were completed. To secure complainant, the contract from Leete to the Leonard & Carter Furniture Company was assigned by it to Leonard, and by Leonard to complainant. The deed of the Eliot-street lot from the trustees of the Brush estate to Leonard, which had been prepared, but not delivered to Leonard, was destroyed, and a new deed made by the trustees direct to complainant, complainant paying the unpaid purchase money. Mr. and Mrs. Leonard signed the following authority:

"DETROIT, February, 1895.

"TRUSTEES BRUSH ESTATE:

"We hereby surrender to you deed dated February 8, 1893, conveying to Henry R. Leonard lot 15, and the

easterly 3 feet of lot 14, in block 10, Brush Farm, and instruct you to make a deed for the same-described premises to Albert L. Stephens, of Detroit, Michigan.

[Signed] "ANNIE E. LEONARD.
"HENRY R. LEONARD."

Eight promissory notes, in the sum of \$5,000 each, were executed by Mr. Leonard, and an agreement was signed by the parties, in which, after reciting the above-named transfers to Stephens and the advances for which they were security, it was provided, among other things, that, upon payment of the first three of the notes, the Eliot-street property should be reconveyed to Leonard. This agreement also provided that Leonard should pay all the taxes, and should keep the property insured, \$10,000 on the Eliot-street house, and \$30,000 on the Gratiot-avenue building, with loss, if any, payable to Stephens. On the 17th of October, 1897, the store building on Gratiot avenue burned. Only \$10,000 insurance was carried on the building, and this proved valueless. Mr. Leonard defaulted in his payments, and complainant filed this bill to foreclose. The court decreed foreclosure, and defendants appeal.

There is only one disputed question of fact which we regard as material in disposing of the case. It is claimed by Mrs. Leonard that she signed the authority to the trustees of the Brush estate above quoted without understanding the purpose for which it was to be used. Indeed, she testifies that she has no recollection of having signed the paper; that she at times did sign papers presented to her by her husband without reading them, and she seems unable to account for her signature to this paper except on the hypothesis that this was one of the occasions. The complainant testifies that, in company with Mr. Hayes, president of the Preston National Bank, he called at the Leonard home, and that the subject of the loan was fully talked over in the presence of Mrs. Leonard, and her attention specially called to it. In this he is corroborated by Mr. Hayes. Mr. and Mrs. Leonard deny that any

such interview took place. A careful reading of the testimony convinces us that Mr. and Mrs. Leonard are at fault in their recollection on this point, and that Mrs. Leonard did fully understand the nature of this transaction, and assented to it, so far as it affected the Eliot-street house, by signing the authorization above referred to.

It is contended that the defendant Annie E. Leonard had a dower interest in the Gratiot-avenue lot, which was not cut off by the assignment of the contract; that she not only has a dower, but a homestead, interest in the Eliot-street lot, and that neither has been barred. The rights of Leonard in each of the two descriptions of property were those of a contract purchaser, the legal title remaining in another. The question is, therefore, whether the purchaser of lands under a land contract has such a title as to vest in the wife an inchoate dower right. The statute (section 8918, 3 Comp. Laws 1897) reads as follows:

“The widow of every deceased person shall be entitled to dower, or the use during her natural life of one-third part of all the lands whereof her husband was seised of an estate of inheritance at any time during the marriage, unless she is lawfully barred thereof.”

Under this section, the wife of the contract purchaser, who has no legal title to lands, is not entitled to dower. *Daily v. Litchfield*, 10 Mich. 29; *Beebe v. Lyle*, 73 Mich. 114. See, also, 1 Scrib. Dower, p. 413 *et seq.*

Defendants' counsel insists that Leonard was seised of a legal title, inasmuch as Stephens' title under his contract and deed was only equitable. The fact is, however, that there never was a complete conveyance by Leete, the holder of the original title of the Gratiot-avenue property, to the defendant, nor was there such a conveyance by the trustees of the Brush estate of the Eliot-street property. The legal estate has never rested in the defendant Henry R. Leonard in either case. Counsel cites the case of *Clapp v. Galloway*, 56 Mich. 272, as authority for the claim that a widow is dowable in lands held by her husband under contract of purchase. It would seem

that the utterance of Mr. Justice SHERWOOD in that case was *dictum*. It is not in harmony with the decisions in this State, both before and after.

The homestead right is open to other considerations. It is conceded that the defendant Annie E. Leonard had a homestead right in the Eliot-street property, but it is contended that it was subjected to complainant's claim by her, intelligently and legally. Under section 10363, 3 Comp. Laws 1897, the homestead right may be cut off by a mortgage or other alienation of the land, signed by the wife. In this case there was a written authority, signed by both husband and wife, directing the owners of the legal title to convey the same to complainant. This was an effective and legal mode of alienating the homestead.

The decree includes a charge for expense incurred in caring for the Gratiot-avenue property after the fire, and for interest on the Leete contract. Defendants contend that these two items should not, in any view of the case, be made a charge against the homestead. We think these items are clearly proper charges. The security is upon the whole property, and is not severable. The agreement between Stephens and Leonard contained a promise that, upon payment of the first three notes maturing, Stephens would release the Eliot-street lot. It is now contended that complainant is bound to collect the amount of the first three notes from the Gratiot-avenue property, and, if the amount of the three notes is realized by a sale of the property, the Eliot-street property is released. If the contract be so construed, the homestead has at no time been a security for any portion of the claim, if we recognize the fact that the interest in the Gratiot-avenue property is worth more than the amount of the first three notes, as it doubtless is. This view does violence to the intention of the parties. The mortgagee is entitled to the whole mortgaged property as security. *In re Scofield Buggy Co.*, 89 Mich. 15; *High v. Fifth National Bank*, 97 Mich. 502 (21 L. R. A. 822). The true intent of this provision was that if, while the security of the Gratiot-avenue prop-

erty remained, the defendant paid down the first three notes, the complainant would accept the Gratiot-avenue property as sufficient security for the remainder of the claim, and release the Eliot-street lot. *Pierce v. Kneeland*, 16 Wis. 672 (84 Am. Dec. 726); *Commercial Bank of Iron Mountain v. Hiller*, 106 Mich. 118. The decree provides that, if the defendant pay the amount of the first three notes and interest before sale, the Eliot-street lot shall be released. This is sufficiently favorable to defendants.

The decree is affirmed, with costs.

The other Justices concurred.

LINN v. LINN.

EQUITY JURISDICTION—MORTGAGES—REVIVOR—FORGED SIGNATURE
—FORECLOSURE.

Where the owner of two purchase-money mortgages discharged them, and accepted in their stead a new mortgage, which, while it purported to be signed by the mortgagor's wife, was in fact forged as to her, and such mortgage was foreclosed and the premises bid in by the mortgagee's administrator in the belief that the wife's claim of forgery was merely a pretense to secure dower and homestead rights, such administrator is entitled, upon its subsequently appearing that the wife's claim is true, to maintain a bill in equity to revive the earlier and genuine mortgages, the same as if the fraudulent mortgage had not been foreclosed. *Palmer v. Sharp*, 112 Mich. 420, followed.

Appeal from Ingham; Person, J. Submitted October 27, 1899. Decided December 2, 1899.

Bill by Peter Linn, administrator with the will annexed of the estate of Lawrence Linn, deceased, against Kate F.

Linn and others, to revive certain mortgages. From a decree dismissing the bill on demurrer, complainant appeals. Reversed.

Smith & Hood (John J. Zimmer, of counsel), for complainant.

A. M. Cummins and *L. B. McArther*, for defendants.

MOORE, J. This proceeding is in chancery. The bill of complaint states, in substance, as follows: The complainant is administrator with the will annexed of the estate of Lawrence Linn, deceased, who was a resident of Wyoming county, N. Y. The defendant Kate F. Linn is the widow, and the remaining defendants are the children and heirs at law, of John B. Linn, a late resident of the county of Ingham, and a son of said Lawrence Linn. John B. Linn died about February 9, 1892. Lawrence Linn died some time afterwards. Late in the winter of 1883, John B. Linn moved into the county of Ingham, and purchased of John J. Rehle, Sr., the S. $\frac{1}{4}$ of the N. E. $\frac{1}{4}$ of section 8, in township 3 N., range 1 E., for a consideration of \$3,100, paying a portion in money and giving back a purchase-money mortgage for the sum of \$1,600. In order to procure a portion of the purchase price, and to establish the homestead, said John B. Linn procured of Amos D. George the sum of \$1,250 by mortgage dated March 1, and acknowledged April 5, 1883, on the premises so purchased. On the 26th day of June in the same year, said John B. Linn loaned from his father, Lawrence Linn, the sum of \$1,600 by way of mortgage on said premises, for the purpose of paying, and with which he actually did pay, the Rehle purchase-money mortgage, and on the same day Rehle discharged said purchase-money mortgage. On the 4th day of March, 1886, Lawrence Linn purchased the George mortgage. Shortly prior to the 27th day of June, 1888, John B. Linn negotiated with his father for a renewal and extension of time for the payment of the mortgages held by him, and was to give to

him a mortgage on the premises, signed by both himself and his wife, Kate F. Linn. On June 27, 1888, John B. Linn went to B. D. York, a lawyer and notary public residing at Williamston, Mich., and caused to be executed a note and mortgage for the sum of \$3,000, payable 10 years after date, with interest after October 1, 1888, at the rate of 6 per cent., with the privilege of paying \$50 or more at any time. This third mortgage covered the property hereinbefore described. It purports to have been executed and acknowledged by John B. Linn and by Kate F. Linn, his wife. Lawrence Linn was not present at the time said mortgage was executed, and received the same believing it was a genuine mortgage executed by both John B. Linn and Kate F. Linn, his wife; and because of such belief, and relying upon it, he, on the same day, discharged the two mortgages held by him.

After the death of John B. Linn, Kate F. Linn made several payments of interest on the mortgage, until the death of said Lawrence Linn. After the death of Lawrence Linn, Kate F. Linn denied that she joined in the execution of said mortgage, and refused to pay further interest thereon. Some time shortly prior to the 6th day of April, 1897, through W. F. Cairns, an attorney residing at Williamston, complainant caused said mortgage to be foreclosed by advertisement. On the foreclosure sale the whole of said premises was purchased by said administrator in behalf of said estate on the 1st day of July, 1897, for the full amount of the mortgage then due, and costs of foreclosure. At the time of the sale, Kate F. Linn served a notice upon the sheriff making such sale that said mortgage was never signed by her, and claimed dower and homestead rights in said mortgaged premises, and claimed that such sale should be made subject to her homestead and dower rights. Complainant, at the time of said foreclosure sale, and for a long time thereafter, believed that said Kate F. Linn executed the mortgage in question. Mr. York, the attorney and notary by and before whom said mortgage was made and acknowledged,

was a person of good standing in the village of Williamson, and a man worthy of credit and belief, and complainant believed he would not have made and signed the certificate of acknowledgment had said Kate F. Linn not executed said mortgage, and complainant believed that the claim of said Kate F. Linn to the effect that she did not execute the said mortgage was only a pretense. The whole of the mortgaged premises was a very scant security for the sum due on said premises, and complainant purchased said premises for the full amount of said mortgage, together with costs, because he then believed that said Kate F. Linn executed said mortgage notwithstanding said pretense to the contrary, and because he had been advised by said Cairns to bid the full amount of said mortgage and costs, for the reason that no decree for deficiency could be obtained for any balance due in case the premises were purchased for less.

During the month of July, 1898, complainant, still acting under the advice of said Cairns, commenced a proceeding before the circuit court commissioner to get possession of the said mortgaged premises; and, at the trial of said matter before said commissioner, said Kate F. Linn testified as a witness in her own behalf that she never signed said mortgage, and claimed dower and homestead rights in the premises, by reason of which said commissioner dismissed said complaint, because the trial of the title to real estate was involved. Complainant, after hearing such testimony, became convinced that said Kate F. Linn did not execute said mortgage; and the amended bill states that Kate F. Linn did not execute the last-named mortgage. Said bill of complaint is filed in this cause to revive and foreclose the mortgage given by said John B. Linn to said Amos D. George, and afterwards assigned to said Lawrence Linn, and also the first mortgage, of \$1,600, given by said John B. Linn and wife to said Lawrence Linn. The bill asks that the mortgage foreclosed by said administrator may be declared defective, imperfect, and partially invalid, and insufficient to bind the homestead

and dower rights of defendants, because said mortgage was not executed by said Kate F. Linn, and that complainant may be subrogated to the rights which Lawrence Linn held under said mortgages. It also contains a general prayer for relief.

The defendants, by their demurrer, and in argument, urge the following, among other, objections against the relief sought in the bill:

1. That complainant has a plain, adequate remedy at law.

2. That the bill of complaint does not state such facts as, if true, would enable the court to grant any relief whatever.

3. That, if the last mortgage designated in said bill of complaint was signed by Kate F. Linn, the complainant is now the owner of the fee simple in said lands, and has a complete, adequate remedy at law to gain possession of the same.

4. If said mortgage was not signed by her, that fact was well known to the agent and attorney of said Lawrence Linn, and said complainant has not urged any fraud on the part of said defendant, or her husband, or any other person. The allegations of fraud contained in said bill of complaint are too indefinite and uncertain to be made the basis of any relief whatever.

5. The facts stated in said bill, taken as a whole, do not entitle said complainant to any relief in a court of equity.

6. On the argument of said demurrer, said defendants urge the further objection, *ore tenus*, that complainant was not entitled to have the \$1,600 Linn mortgage revived, for the reason that the certificate of acknowledgment does not show that the execution of said mortgage was acknowledged by her, and that by reason thereof said mortgage was not a valid release, *pro tanto*, of her dower rights.

The circuit judge sustained the demurrer. He was of the opinion that the fraud alleged in the bill is sufficient to entitle complainant to relief, and said he would have no doubt of the equity of the bill had it not been that, after the administrator knew of the claim of Mrs. Linn, he foreclosed the mortgage, and bought the land at the foreclos-

ure. This had the effect, in his opinion, to give him a valuable interest in the land, which has ripened into a title in fee. This title he holds, and does not, in the bill, offer to surrender. The circuit judge was also of the opinion that, while the administrator might bid in the land, after purchasing it he had no power to sell it, or to surrender the title, except upon license by the probate court.

The solicitors have filed able briefs, in which the various phases of the case are carefully discussed. We do not deem it necessary to follow that discussion in this opinion. We agree with the learned circuit judge that the case presented by the bill is an equitable one. It appears by the bill that all the money obtained from the elder Linn was applied upon the payment of this real estate, in which the widow of John B. Linn now claims homestead and dower interests, which she seeks to preserve, because the mortgage which was foreclosed by newspaper advertisement was not in fact executed by her, though it purported to be executed and acknowledged by her. If her claim is true,—and for the purposes of this case it must be regarded as true,—a forged mortgage was palmed off upon the elder Linn as genuine, and, relying upon its genuineness, he was induced to discharge two mortgages which he then held. One of these mortgages was given to him for money he had loaned his son to enable him to take up the Rehle purchase-price mortgage. The other was given to Mr. George for money he let John B. Linn have to pay directly upon the purchase of the farm. The equities of the bill are strongly with the complainant. *Fournier v. Chisholm*, 45 Mich. 417; *Converse v. Barnard*, 114 Mich. 622. The right of complainant to have the earlier mortgages revived because of the fraud which was perpetrated upon the elder Linn, although the administrator had caused the last mortgage to be foreclosed, supposing it to be a genuine mortgage, is very clearly established in the late case of *Palmer v. Sharp*, 112 Mich. 420.

If the circuit judge was right in holding that, after the

purchase of the land at the foreclosure sale, the administrator could not surrender it, his offer to do so, in the bill of complaint, would be an idle ceremony, and to us it seems an additional reason why the court of equity, which can work out complete relief to all the parties, and protect all their rights, should take jurisdiction.

The decree of the court below is reversed, and the case remanded. The defendants are given 15 days in which to answer after a copy of this decree is served upon their solicitors.

The other Justices concurred.

AUDITOR GENERAL v. AYER.

1. TAXATION — BOARDS OF SUPERVISORS — RECORD OF EQUALIZATION.

Auditor General v. Sparrow, 116 Mich. 574, affirming the sufficiency of a record of equalization of taxes by a board of supervisors, approved.

2. SAME—BOARDS OF REVIEW—SUFFICIENCY OF CERTIFICATE.

Under section 37 of the tax law of 1893, providing that if it shall appear to the board of supervisors, at its October session, that any certificate, paper, or record submitted to it is not properly certified, the board may authorize and require such defect or omission to be corrected, it is immaterial that the certificate of the board of review to an assessment roll is dated in the October following the review.

3. SAME—FIXING VALUATIONS—INVALID AGREEMENT.

An arrangement by a board of review that all lands owned by several taxpayers in the north half of the township shall be assessed at a uniform value is invalid.

4. SAME—SUBSEQUENT ENTRY ON ROLL.

Where the board of review meets and acts upon the question of values at the time provided by law, it is immaterial that the entry upon the roll of the values so fixed is not made until afterwards.

122	136
125	708

122	136
s80nw	997

Appeal from Gogebic; Haire, J. Submitted October 26, 1899. Decided December 2, 1899.

Petition by Roscoe D. Dix, auditor general, for the sale of lands delinquent for taxes: On objections filed by Frederick Ayer and others. From a decree for petitioner, defendants appeal. Affirmed.

C. E. Miller, for petitioner.

M. J. Sherwood, for defendants.

LONG, J. This is an appeal from the decision of the circuit court in chancery of Gogebic county in a proceeding by the auditor general under the statute for the sale of lands for the taxes delinquent for 1895. The taxes involved are the state and county taxes for the year 1895 in the townships of Bessemer, Wakefield, Watersmeet, and Marenisco, and the entire of the taxes in the township of Ironwood. The respondents contend that these taxes are void for the reasons:

(1) That the pretended equalization of the board of supervisors was not in accordance with the statute, in that it did not show the additions and deductions made by the board in reaching the equalized valuations.

(2) That it was an attempted equalization, if anything, of the entire property of the cities and townships, both real and personal.

(3) That the total equalized valuation, as fixed by the board, was not so fixed by the judgment of the board.

(4) That large quantities of personal property and \$125,000 of real property in the township of Bessemer were not added into the total valuations in the said roll, and were not considered by the board in fixing its equalized valuation.

(5) That no statements of the value of property were called for or received by the assessing officer in the township of Wakefield or in the city of Ironwood.

(6) That the board of supervisors, though large additions and deductions were made in the various rolls, never found as a fact or determined that the real property had not been uniformly estimated at its cash value by the various assessing officers and boards of review.

The court below overruled these objections, and entered a decree for the sale of the lands in accordance with the petition of the auditor general; and the respondents, who are the owners of the lands, have appealed.

1. It is unnecessary to set out here the action of the board of supervisors in the equalization of the taxes any further than to remark that the record shows the action to be similar to that in *Auditor General v. Sparrow*, 116 Mich. 574, and in which it was held that the record of the equalization was sufficient. In that case this whole question was discussed at length, and settles against the respondents the question raised here.

2. There is nothing in the record showing or tending to show that the board of supervisors undertook in any way to change the value of personal property as fixed by the assessing officer.

3. There is no proof in this record tending to show that any real or personal property was omitted by the board of review which should have been included. In regard to respondents' claim that \$125,000 of personal property was assessed in the township of Bessemer upon which no taxes were assessed, we have examined the original assessment roll, and are satisfied that counsel for respondents is mistaken as to what the roll shows. The assessment of the personal property mentioned does not read \$125,000, but \$12,500, and the tax is carried out upon that amount.

4. It is contended that all the taxes for 1895 are invalid in the township of Ironwood, and it is asserted that the board of review, or some party without authority, altered the valuations of the lands of the respondents after the board of review had fixed the valuations at the several meetings of the board; that the valuations of the supervisor throughout the entire roll were thus altered and changed on lands other than the respondents'. Counsel for respondents claims that the testimony shows that Mr. Longyear, who is one of the respondents, acting for himself and as the agent of the other contestants, appeared before the board of review at its second meeting, on May

27th, and again on the following day; that three members of the board of review were present, and at Mr. Longyear's request the board unanimously fixed the valuation of the lands of the respondents lying north of the line extending through the middle of township 48 north at \$1.25 per acre, and agreed that the lands lying south of that line should remain as fixed by the supervisor; that at that time none of the valuations as fixed by the supervisor had been changed by the board of review; that early in July a part of the roll had been changed, and the column for the "Valuations as Fixed by the Board of Review" had been filled in for the descriptions in the north part of the town, but that the roll as finally completed showed alterations in the valuations of lands, not only in the north part, but all over the township, and the valuations of many of the lands of respondents had been fixed above \$1.25 per acre, and that many of the supervisor's valuations had been changed, some being raised and some lowered; that no certificate of the board of review was attached until October 18, 1895.

It is apparent that the date of the certificate can have no effect upon the question of the validity of these taxes, as, under the tax law of 1893, by section 37, it is provided that, whenever it shall appear to the board of supervisors that any certificate, paper, or record is not properly certified, the board may authorize and require such defect or omission to be corrected. It must be presumed that the certificate was made as required by law.

We think the testimony in the case does not bear out the contention made by counsel for respondents. It appears from the testimony that the board made no memorandum of its arrangement made with Mr. Longyear, and that there was no evidence of the value of these various descriptions introduced before the board of review; that some of these lands were worth much more than \$1.25 an acre, and some much less; and that Mr. Longyear did not own all these lands. It appears that, if the board had carried out this agreement, the result would have been

that the property of some of these taxpayers would have been assessed much higher than the real value, and some much lower. The board did not carry out the agreement, and it was not in error in not doing so. No arrangement could legally be made by which the whole or half of a township should be assessed at a uniform value. Each parcel must be assessed at its true cash value, so that there may be protection to each taxpayer, and in no other way could the taxpayer be protected. There is no testimony tending to show that the board of review met after the time fixed by the statute. It is true that there is testimony showing that the entries of the amounts fixed by the board were not made at that time; but the carrying out of the amounts fixed by the board was mere clerical work, and, if the board actually acted upon the question of values at the time fixed, the fact that such values were not carried out in the appropriate column within the time was but an irregularity, which would not make the taxes void. The case is not like *Auditor General v. Sparrow, supra*. In that case the agent of Mr. Sparrow went to the township of Watersmeet for the purpose of a hearing before the board of review. The agent found the roll completed to page 27 only; and it was held that all taxes appearing upon the roll after that page were invalid. As to the taxes in the township of Wakefield, the record showed that on the 28th and 29th of May the board had passed a general resolution making sweeping alterations in the roll by way of reduction. It was held that the board had no right at that meeting to take the action it did. In that case, however, no question arose but that the board acted in changing valuations after the time provided by law. In the present case the record does not show the amounts as originally assessed against the lands of the respondents, and this court cannot say as a matter of fact that the valuations upon the lands of these respondents were raised at all. Therefore it does not appear that the respondents are in any manner injured by the action taken.

The court below was not in error in the decree made. That decree must be affirmed, with costs.

MONTGOMERY, HOOKER, and MOORE, JJ., concurred. GRANT, C. J., did not sit.

HALL v. NESTER.

EQUITY JURISDICTION — CONTINUING TRESPASS — INJUNCTION — DAMAGES.

Where complainant was the owner of improvements along certain rivers, constructed for the purpose of driving logs down such rivers, and defendants, by force, seized such improvements, and retained them for several weeks, and proposed to retain them during an entire logging season, and were using them in such manner that lands belonging to complainant were damaged, and liable to suffer further damage, the trespass being a continuing one, complainant was entitled to equitable relief by injunction and assessment of damages.

122	141
124	411

122	141
880	982

122	141
184	277

122	141
185	590

122	141
137	511

122	141
147	147

147	609
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122	141
1155	325

Appeal from Marquette; Stone, J. Submitted October 27, 1899. Decided December 2, 1899.

Bill by Lewis A. Hall against John F. Nester and others for an injunction. From an order overruling a demurrer to the bill, defendants appeal. Affirmed.

Clark & Pearl, for complainant.

Chadbourne & Rees, for defendants.

PER CURIAM. The opinion of the learned circuit judge so clearly states the issue and the principles of law and equity involved that we adopt it:

“The bill of complaint in this cause states that in 1891 the complainant and Robert H. Munson and William C.

Busch organized a corporation known as the 'Yellow Dog River Improvement Company,' under the provisions of our statute, for the improvement of a small stream in said county, known as the 'Yellow Dog River,' a stream that flows through certain lands therein described; that said company also improved a stream known as 'Iron River,' which is the outlet into Lake Superior; that said improvement was for the purpose of assisting and facilitating the driving of logs down the said stream in the season of high water; that said company deepened the said streams, blasted out rock in their beds, and constructed a dam across the stream, and also constructed a dam, at the outlet of Lake Independence, across the said Iron river, for the purpose of raising the water in the said lake to furnish artificial floods with which to drive logs down the said Iron river into Lake Superior; that the said improvement company was the owner of all the lands surrounding said Lake Independence, except certain lots specified; and that said company improved said streams and erected said dams at an expense of \$18,000. The bill states that on the 11th day of March, 1897, the said corporation was duly dissolved, and a receiver appointed; that, upon a request of all the parties in interest, the said receiver deeded all of the property of said late corporation to the complainant on the 3d day of May, 1898; that by said conveyance complainant became vested with the title to all of said lands, as well as the said dams and other improvements on the banks of the said streams, out to the thread or channel of the stream, including the said dams specifically described in said bill; that complainant is the owner of the land upon which the dam on the said Yellow Dog river is situated.

"The bill states that the defendants have, during the past winter, lumbered and banked in the said stream about twelve million feet of pine sawlogs, and that said defendants have, without obtaining permission from complainant, or from said receiver, or from any other person having authority from complainant, taken possession of complainant's said property,—not only his structures for raising water, but have also put in slash-boards, so as to flood complainant's said land above the said dam, and have been flooding the same for about six weeks, and, without permission from complainant, defendants have been flooding the said land of complainant, which is covered largely with hard wood and mixed timber, which

is liable to be damaged and killed by such floods; that the defendants assert that it is their purpose to use the said property of complainant by force, and without consent of complainant, to aid in the driving of said twelve million feet of sawlogs down and through the said streams, without paying therefor, and to the detriment and damage of complainant; that said defendants entered upon the land of complainant near the said Lake Independence, and have taken possession of the logging-house belonging to complainant, and have occupied it as a logging-camp, without permission and as trespassers, and have also taken possession of the gates belonging to the said dam at the outlet of Lake Independence, on complainant's land, and have held the same by force, and that said defendants have threatened to throw the employé of complainant, in charge of the said property, into the stream, and drown him, if he interferes with their occupation and use of the said property in any way. The bill proceeds to state the value of the use of said property, and prays that the defendants be enjoined from using the structures of complainant upon his said land, and from taking complainant's gates and slash-boards, and from closing the natural flow of said stream for the purpose of creating said storage of water and floods as aforesaid, and from building, placing, constructing, repairing, and maintaining or operating the said dams upon the said streams so as to cause complainant's said lands to be used as storage ground for water and for reservoirs of water for producing floods as aforesaid, and from operating the dams on said streams in any place from which the waters in said streams would be backed up and flowed on complainant's said lands. The bill then prays for an accounting touching the amount due complainant by way of damages for flowage of said lands, and the destruction of timber, and for the use and occupation of said lands and water privileges, and also prays for general relief.

"The bill was filed on May 6, 1898. I ordered that an injunction issue, but provided that, if defendants would execute a bond to complainant, conditioned to pay him the damages that he had sustained from the injury of the property of complainant named in the bill, and for the use and occupation of the same by defendants, the said injunction should be dissolved. I made this order because I did not want to oppress the defendants, and because it seemed to me that to stop the logs where they were would cause

them great damage. The bond was given, and no injunction was ever served. This bill has been demurred to upon the grounds that the facts as stated in the bill do not entitle complainant to an injunction, for the reason that no irreparable damage was alleged, and no damage is shown which cannot be fully, completely, and adequately compensated in damages recoverable in a suit at law, and because complainant has an adequate remedy at law, and the damages, if any, should be assessed by a jury. In considering this demurrer we must take the statement of facts in the bill as true. If this bill is true, the trespass here complained of is not a casual trespass. It presents a case where the defendants propose to usurp and seize the lands and property of the complainant, and use them for an entire season,—for the court will take notice that to drive twelve million feet of logs down this stream would take an entire season; in fact, counsel for defendants, upon the argument, admitted that all of the logs had not yet been run down; and when the bill was filed defendants had been in possession of some of the property for six weeks. The bill prays for a perpetual injunction to restrain defendants from a similar trespass in the future. This fact alone might furnish a reason why the court should hold the case, and why damages alone might not furnish an adequate relief.

“The first question to be answered is, Does the bill state a case entitling complainant to an injunction? I think that the modern rule has enlarged the jurisdiction of equity in cases of trespass and other like cases. Mr. Pomeroy, in his *Equity Jurisprudence*, at section 1357, states the law to be this:

“If a trespass to property is a *single act*, and is *temporary* in its nature and effects, so that the legal remedy of an action at law for damages is adequate, equity will not interfere. The *principle* determining the jurisdiction embraces two classes of cases, and may be correctly formulated as follows: (1) If the trespass, although a single act, is or would be destructive, if the injury is or would be irreparable,—that is, if the injury done or threatened is of such a nature that, when accomplished, the property cannot be restored to its original condition, or cannot be replaced, by means of compensation in money,—then the wrong will be prevented or stopped by injunction. (2) If the trespass is *continuous* in its nature, if repeated acts of wrong are done or threatened, although each of these acts, taken by itself, may not be destructive, and the legal remedy may, therefore, be adequate for each single act *if it stood*

alone, then, also, the entire wrong will be prevented or stopped by injunction, on the ground of avoiding a repetition of similar actions. In both cases the ultimate criterion is the inadequacy of the legal remedy. All the cases, English and American, have professed to adopt the inadequacy of legal remedies as the test and limit of the injunctive jurisdiction; but in applying this criterion the modern decisions, with some exceptions among the American authorities, have certainly held the injury to be irreparable, and the legal remedy inadequate, in many instances and under many circumstances where Chancellor Kent would probably have refused to interfere. It is certain that many trespasses are now enjoined which, if committed, would fall short of *destroying* the property or of rendering its restoration to its original condition impossible. The injunction is granted not merely because the injury is *essentially* destructive, but because, being continuous or repeated, the full compensation for the entire wrong cannot be obtained in one action at law for damages. While the same formula is employed by the courts of equity in defining their jurisdiction, the jurisdiction itself has practically been enlarged. Judges have been brought to see and to acknowledge—contrary to the opinion held by Chancellor Kent—that the common-law theory of not *interfering* with persons until they shall have actually committed a wrong is fundamentally erroneous, and that a remedy which *prevents* a threatened wrong is in its essential nature better than a remedy which permits the wrong to be done, and then attempts to pay for it by the pecuniary damages which a jury may assess. The ideal remedy in any perfect system of administering justice would be that which absolutely precludes the commission of a wrong, not that which awards punishment or satisfaction for a wrong after it is committed.'

"See foot-note for particular instances in which injunction has been granted. See Id. §§ 138, 170, 220, 221, 1346; *Troe v. Larson*, 84 Iowa, 649 (35 Am. St. Rep. 336); *Shields v. Arndt*, 4 N. J. Eq. 234; *Holsman v. Bleaching Co.*, 14 N. J. Eq. 343.

"Concurrent jurisdiction should be exercised when the object sought is incapable of being accomplished by courts of law; as, for instance, a perpetual injunction, or a preventive process, to restrain trespass, nuisance, or waste. It may be said, therefore, that concurrent jurisdiction of equity extends to all cases of legal rights when, under the circumstances, there is not a plain, adequate, and complete remedy at law. Story, Eq. Jur. §§ 76, 926-929. If the trespass be fugitive and temporary, and adequate compensation can be obtained in an action of law, there is no ground to justify interference in equity. But if a party

threatens to or does take possession of a man's farm, or mill, or other real estate for a whole season, to the exclusion of the owner, must the owner stand by, and content himself with figuring out his damages? I think not. So I conclude that the bill entitled the complainant to an injunction: That he did not get one is not his fault. The court had jurisdiction. The principle that equity, having once acquired jurisdiction, will retain it, to give such full relief as will finally dispose of the controversy, is well settled. *Whipple v. Farrar*, 3 Mich. 436 (64 Am. Dec. 99); *Miller v. Stepper*, 32 Mich. 194; *Wallace v. Wallace*, 63 Mich. 326; *Drayton v. Chandler*, 93 Mich. 383, 388; *In re Axtell*, 95 Mich. 244; *Chase v. Boughton*, 93 Mich. 285; *George v. Light Co.*, 105 Mich. 5. The court sometimes sends the complainant to a court of law, as it did in *Brown v. Gardner*, Har. Ch. 299, cited by defendants' counsel; but one of the reasons there stated was that the court did not feel called upon to keep the parties in the Supreme Court, and send an issue down to the court to try the question of trespass, and then, if so found, to assess damages. The general rule is, as stated above, to hold the case for the purpose of giving damages. The parties have all appeared, and are before the court. A bond has been given to pay any damages that may be found due. This court has the power, if deemed wise, to call a jury, and take its advice as to the damages, and I see no reason why the bill should be dismissed. As it is, the court will have power to order a perpetual injunction as to the future, and thus save another suit. The demurrer will be overruled, and the defendants given 20 days in which to answer, on payment of the costs of the demurrer to be taxed."

Decree affirmed, with costs, and the case remanded for further proceedings.

MILLER v. BROWN.

TAX SALES—VALIDITY OF DECREE—FAILURE OF COURT TO RE-MAIN IN SESSION.

A decree for the sale of land for taxes is void where, on the day fixed for hearing the auditor general's petition, the court adjourned to a day six days later, and on that day adjourned to a day four days later, on which day the decree was rendered; the taxpayer being entitled, under section 66 of the tax law (Act No. 206, Pub. Acts 1898), to five court days, after the day fixed for the hearing, in which to ask leave to file objections to the tax.

122	147
128	532
122	147
80NW	999
122	147
136	161
122	147
143	241

Appeal from Kalkaska; Aldrich, J. Submitted October 27, 1899. Decided December 2, 1899.

Bill by Cassius E. Miller against Frank E. Brown and John Sehler to quiet title. From a decree dismissing the bill, complainant appeals. Affirmed.

James H. McFarlan, for complainant.

Wolcott & Ward, for defendants.

MONTGOMERY, J. This is a bill to quiet title. The bill was dismissed, and complainant appeals. The complainant claims under a tax deed from the auditor general for taxes of 1893, on a sale made under a decree rendered October 4, 1895. It is contended that the decree authorizing sale was unauthorized, for the reason that the owner was not allowed five days in term within which to present application for leave to file objections. The order fixed the day of hearing as September 24, 1895. The circuit judge was not present on that day, but sent an order to adjourn the court to Monday, the 30th, which was done. The court was in session on the 30th, and adjourned to October 4th, when the decree was rendered.

Section 66 of the tax law (Act No. 206, Pub. Acts 1893) provides that:

"If, within the first five days after the day fixed in such notice for the hearing of such petition, it shall be made to appear to the court that any person has been prevented from filing objections to any tax, without fault on his part, such further time may be granted for that purpose as may seem proper, not exceeding five days."

We think the owner of lands is entitled under this section to five court days; *i. e.*, five days in which he can make it appear to the court that he has been prevented from filing objections, etc. See *McGinley v. Mining Co.*, 121 Mich. 88. This does not mean five consecutive days, but five days in which the proceedings authorized may be taken. The case is unlike *Gates v. Johnson*, 121 Mich. 663. In that case it appeared that the court was adjourned from day to day for the express purpose of receiving applications, and that it was a fair inference that the judge was ready to appear in court at any time to hear any taxpayer desiring to present his claim. This was held sufficient. But in this case there was no opportunity to present an application to the court before September 30th, and after that date no other opportunity until October 4th.

The decree will be affirmed.

The other Justices concurred.

TUCKER v. CHICAGO & GRAND TRUNK RAILWAY CO.

1. RAILROADS—INJURY AT CROSSING—CONTRIBUTORY NEGLIGENCE.

Plaintiff stopped his horses 98 feet from a railroad crossing, and looked and listened, but neither saw nor heard an approaching train. He did not look again, but told his 15-year-old daughter to keep watch, and she appeared to him to be doing so. They were struck by a train which must have been visible to the daughter, had she looked, from any point within 75 feet of the crossing. The statutory signals, it was claimed, were not given. *Held*, that plaintiff could not recover.

2. SAME—LATE TRAIN.

The fact that one approaching a railroad crossing knows that it is not the scheduled hour for any train does not relieve him of the duty to look and listen, he being chargeable with notice that trains often run behind scheduled time.

Error to Eaton; Smith, J. Submitted November 14, 1899. Decided December 2, 1899.

Case by Servetus H. Tucker against the Chicago & Grand Trunk Railway Company for personal and other injuries. From a judgment for plaintiff, defendant brings error. Reversed.

About three-quarters of a mile westerly of Bellevue station, plaintiff, while riding in a top buggy drawn by two gentle horses, with its sides and back closed, was struck upon the highway crossing by the defendant's fast train, running at the rate of from 45 to 55 miles an hour. His daughter (15 years old) and his horses were killed, and he was seriously injured. For this injury he brought suit, and recovered a verdict upon the ground that the statutory signals were not given. Defendant's roadbed runs in a south-westerly direction. The highway approaches it from the north and east at an acute angle. Plaintiff was driving westerly, and the train was westward bound.

122	149
f136	*287
136	*357
122	149
j147	*215
j147	*216
122	149
f153	48
122	149
157	*166

Plaintiff testified that, when about 93 feet from the track, he stopped, looked, and listened, and neither heard nor saw a train; that he walked his horses a few feet, and then started them in a trot at a gait of about 5 miles an hour, and neither saw nor heard the train, nor heard any signals, before he was struck; that he sat upon the right of the buggy, and his daughter upon the left, towards the approaching train; that he was familiar with the crossing, and regarded it as a dangerous one; that he told his daughter to keep watch; that she leaned forward, with one hand on the dashboard, looked in the direction of the approaching train, but gave no notice to him of its approach; and that the hearing and the eyesight of both were good. It is demonstrated by the plaintiff's own evidence that, at a point 100 feet northerly in the highway from the center of the track, one could see a man on the track 825 feet easterly of the crossing, and a train or engine 1,073 feet from the crossing. According to the defendant's testimony, from actual experiments, the train would be visible for about 1,500 feet. It is also conclusively established that, at any point in the highway within 75 feet of the crossing, the train was plainly visible as far as the station.

E. W. Meddaugh (Geer & Williams, of counsel), for appellant.

Powers & Stine, for appellee.

GRANT, C. J. (*after stating the facts*). Plaintiff himself did not look or listen while going 93 feet. A look at any time within 75 feet would have disclosed the coming train. Either his daughter did not look, or, if she looked, gave no warning. That she could have seen is unquestioned, for there was nothing to obstruct her vision. Defendant was running its cars at a lawful rate of speed. It was in the country. There was no occasion for slackening speed until some danger was apparent. The fact that the train was late is immaterial. Travelers are charged

with notice of the fact that trains are often behind time, and their duty to look and listen is not lessened by the fact that the schedule time of a train is past. The case is clearly within the following decisions: *Grostick v. Railroad Co.*, 90 Mich. 594; *Gardner v. Railroad Co.*, 97 Mich. 240; *Osborn v. Railway Co.*, 115 Mich. 102. In those cases other authorities are cited. See, also, *Artz v. Railroad Co.*, 34 Iowa, 153; *Pittsburgh, etc., R. Co. v. Frazee*, 150 Ind. 576 (65 Am. St. Rep. 377); *Chicago, etc., R. Co. v. Pounds*, 27 C. C. A. 112, 82 Fed. 217; *South-ern R. Co. v. Smith*, 30 C. C. A. 58, 86 Fed. 292 (40 L. R. A. 746).

Judgment reversed, and a new trial ordered.

The other Justices concurred.

GURD v. AUDITOR GENERAL.

TAX SALES—VOID DEED—REFUNDING PURCHASE MONEY—MANDAMUS TO AUDITOR GENERAL.

Under section 98, subd. 3, of the tax law of 1893, authorizing the auditor general to refund the purchase price of lands sold for taxes in case the sale was made in contravention of any of the provisions of the act, *mandamus* will lie to compel the auditor to cancel a deed of state tax land, and to refund the amount paid therefor, where the notice of the original sale on which the deed is based was published in a newspaper printed in the Holland language. Following *Visscher v. Ottawa Circuit Judge*, 116 Mich. 666; *Cockburn v. Auditor General*, 120 Mich. 643.

Mandamus by Alfred T. Gurd to compel Roscoe D. Dix, auditor general, to refund the purchase money on a void tax sale. Submitted November 14, 1899. Writ granted December 2, 1899.

122	151
s80	1005
182	264
e182	267
o182	269
122	151
c135	289
e185	290
122	151
140	647

Thomas, Cummins & Nichols, for relator.

Horace M. Oren, Attorney General, for respondent.

MOORE, J. In February, 1897, the relator purchased from the State certain State tax lands, obtaining a tax deed therefor in the following June. He seeks now to have said deed canceled because it is void, and his money refunded. At the annual tax sale in 1894 in Ottawa county, the lands in controversy were bid in by the State for the taxes of 1892. The notice of the sale of these lands was published in a newspaper named *De Grondwet*, a newspaper published in the Holland, or Dutch, language. It is not claimed by the auditor general that this was a proper publication. He bases his refusal to refund the amount paid for these lands upon the ground that he has no authority to refund except as expressly provided by statute, and that it did not clearly appear to him that the statute in this case authorized him to refund.

Section 98 of the general tax law (subdivision 3) authorizes the auditor general to refund the amount paid by the purchaser "if the sale was in contravention of any of the provisions of the act." I think it can hardly be contended that a sale would not be in contravention of the provisions of the act if no notice had ever been published. If a void notice is published, how is the sale brought within the provisions of the act? In *Visscher v. Ottawa Circuit Judge*, 116 Mich. 666, where a notice like this was published in the same newspaper as the one publishing this notice, it was held the notice was void; and we think it follows that this notice, and all subsequent proceedings based upon it, including the deed which was issued to the relator, are void. In *Cockburn v. Auditor General*, 120 Mich. 643, it was held that the deed issued to the relator was, by virtue of the decision in *Hughes v. Jordan*, 118 Mich. 27, void, and should be so treated in that proceeding. It was also held, in effect, that the money paid to the auditor general by the relator in that case must be treated as the money of the relator, and, when supple-

mented by a further payment, equal to the amount due the State and the taxes which were a lien upon the land, he should be entitled to a deed of the land for which he had applied. This case comes within the principle of that case. It would not be contended that, if relator's deed was held void by some court, he would not be entitled to have his money refunded. Neither will it be contended but that it would be the duty of a court to hold it void in a proper proceeding. We do not see how any good purpose can be served in requiring such a proceeding to be brought before the relator could obtain his money. The sale made by the auditor general of these lands was in contravention of the statute. The case comes within the provisions of the statute, and the writ of *mandamus* should issue. It is so ordered.

The other Justices concurred.

REED v. ST. CLAIR CIRCUIT JUDGE.

1. MANDAMUS—CERTIORARI TO PROBATE JUDGE—JURISDICTION OF CIRCUIT COURT.

Mandamus will not lie to compel a circuit judge to set aside a judgment reversing on *certiorari* an order of the probate court, upon the ground that the respondent had no jurisdiction to hear the matter on *certiorari*, since his action in assuming jurisdiction is reviewable on writ of error.

2. SAME—ORDER TO SHOW CAUSE.

The fact that an order to show cause was issued on an application for *mandamus* is not conclusive that *mandamus* is the proper remedy.

Mandamus by Ann Reed to compel Watson Beach, presiding as circuit judge in St. Clair county, to vacate a judgment. Submitted November 14, 1899. Writ denied December 2, 1899.

122	153
80	985
138	122
138	699
122	153
137	126
122	153
146	440

John L. Black and Herman W. Stevens, for relator.

John B. McIlwain and Frank Whipple, for respondent.

LONG, J. Relator presented her petition to the probate court of St. Clair county, alleging she was the widow of Peter W. Reed, deceased, and asking statutory allowance out of his estate. From an order granting an allowance, the matter was removed by *certiorari* to the circuit court. Although a motion was made to dismiss the *certiorari*, the case went to hearing on its merits, and a final judgment was rendered reversing the order of the probate court. Relator now applies for *mandamus* to compel the circuit judge to set aside that final judgment.

The circuit judge returns that the facts were all agreed to, as follows:

1. That on December 26, 1863, Ann Reed left the home of Peter W. Reed, deceased, in the city of Port Huron, during his absence, taking with her her daughter, and leaving in the house two little sons, and never thereafter returned or lived with him as his wife or as a member of his family.
2. That her remaining apart from him after that time was against his will, and in disregard of his repeated requests that she should return to him.
3. That in January, 1867, deceased went to live in Indiana, and on April 29, 1868, he obtained a divorce from Ann Reed in the court of common pleas of Vigo county, Ind., a court of competent jurisdiction; that he returned to Port Huron, July 3, 1868, and on July 22, 1868, was joined in marriage at St. Clair, Mich., to Caroline Jones, and immediately took up his residence in Port Huron, where he resided until his death, May 9, 1898, engaged during all that time in the practice of medicine, the said Caroline Jones Reed living with him openly and publicly as his wife until the fall of 1897, when they separated, and on March 6, 1898, were divorced, on her application, by the circuit court of St. Clair county.
4. That, at the time of deceased's return to Port Huron, Ann Reed was a resident of said city, and continued to reside therein practically all the time to within three or four years of Dr. Reed's death, and for several years within

a block of him, on the same street; that she learned of the Indiana divorce shortly after his return, and knew that he and his second wife were living together as man and wife from shortly after their marriage, in 1868, to the fall of 1898, over 30 years, and took no steps to assert any rights she might have as wife, or to question the Indiana divorce, until November, 1881, as hereinafter stated, and from 1868 to 1881 she supposed she was legally divorced from Peter W. Reed.

5. That on November 28, 1881, Ann Reed filed a bill for separate maintenance against Peter W. Reed in the circuit court for St. Clair county, in chancery, claiming to be his lawful wife, on the hearing of which a decree was rendered by said court in her favor, the court finding (a) that Ann Reed is, and was, at the time of the commencement of this suit, the lawful wife of Peter W. Reed; (b) that Peter W. Reed was of sufficient ability to support and maintain her, and did neglect and refuse to provide at all for or contribute towards her maintenance; that that case was reviewed by the Supreme Court, the decree below reversed, and the bill dismissed. *Reed v. Reed*, 52 Mich. 117.

6. That, upwards of four years prior to Dr. Reed's death, Ann Reed was not a resident of the State of Michigan, but was living with her son, in the State of Dakota, and came to Port Huron, after his death, in response to a telegram from her son, and has remained here, at her son's request, looking up evidence to contest the will of the deceased.

7. That Peter W. Reed died testate, disposing of his entire estate, which will was admitted to probate in the probate court of said county, from which an appeal was taken by the son and granddaughter to the circuit court, where the same is now pending.

8. That the order of the probate court granting the allowance to Ann Reed, as widow, was made May 2, 1899. *Certiorari* was promptly taken to the circuit court, and although a demurrer was interposed, and a motion to dismiss filed, they were not disposed of as preliminary matters, but, by agreement, the *certiorari* was brought on for hearing on its merits, and a final judgment entered thereon, July 8, 1899, setting aside the order of the probate court.

It is the contention of counsel for respondent (1) that *mandamus* is not the proper remedy, and that the case

should come to this court by writ of error; (2) that the stipulated facts show that Ann Reed is not the widow of Peter W. Reed, deceased, nor a member of his family, and that the order of the probate court was an illegal exercise of authority, in excess of his jurisdiction, and therefore the case was properly brought into the circuit court by writ of *certiorari*, and that court properly set aside the order of the probate court. The main contention of counsel for relator here is that the probate court had jurisdiction to make the order, and, if the order was an appealable one, it must have been removed to the circuit court by appeal, and not by *certiorari*, and therefore that the order made by the circuit court is void.

It is well settled that *mandamus* does not lie when the remedy sought is the revision of a final judgment on matters of record, and when everything necessary to a determination may be returned on a writ of error. *Olson v. Muskegon Circuit Judge*, 49 Mich. 85. Neither will *mandamus* lie where there is any other adequate remedy. See *Mardian v. Wayne Circuit Judge*, 118 Mich. 353, and cases there cited. The same rule was applied in *Michigan Mut. Fire Ins. Co. v. Wayne Circuit Judge*, 112 Mich. 270, and it was said: "If the court claims jurisdiction in a case where it is not entitled to exercise it, such action of the court can be reviewed by appeal or writ of error. In such a case, the writ of *mandamus* ought not to issue." In *Olson v. Muskegon Circuit Judge*, *supra*, it was said: "On examination of the record, it is plain that the court is asked to revise the final judgment of the circuit court upon grounds and matters which appear of record, and where everything necessary to a determination would be regularly returnable on writ of error. That the jurisdiction by *mandamus* is not suitable is clear,"—citing *Stall v. Diamond*, 37 Mich. 429; *O'Brien v. Tallman*, 36 Mich. 13; *Mabley v. Judge of Superior Court*, 32 Mich. 190; *Wiley v. Allegan Circuit Judge*, 29 Mich. 487.

The fact that an order to show cause was issued in the

present case did not rule the question that *mandamus* was the proper remedy. As was said in *Olson v. Muskegon Circuit Judge*:

“It frequently occurs, no doubt, that the court will not even go so far as to make an order; but, when this is so, it is because the case is so clear against the relator on the presentation of his papers that the court is not disposed to assent to any step which contemplates further cost. But the application being *ex parte*, it is not to be supposed that the court, though it allow an order, will consider itself or the defendant, who has not been heard, concluded on the question of the validity and propriety of the remedy.”

Since the return of the present case into this court, we are able to see just what the real controversy is, and what was stipulated to in the court below. The circuit court held that it had jurisdiction to hear the case from the probate court on *certiorari*. Relator contends that the circuit court had no jurisdiction to hear it on *certiorari*. The case falls so squarely within what was said by us in *Michigan Mut. Fire Ins. Co. v. Wayne Circuit Judge* on this point that no further discussion is necessary to show that *mandamus* is not the proper remedy. In view of this, we are not called upon to discuss or decide the other questions.

The writ of *mandamus* must be denied.

The other Justices concurred.

122	158
149	325

RATTENBURY v. COMMON COUNCIL OF VILLAGE OF
NORTHVILLE.

INTOXICATING LIQUORS—SUPPRESSION OF SALE—HOTELS.

A room in a hotel, set apart for the sale of intoxicating liquors at retail, is a saloon, within 1 Comp. Laws 1897, § 2769, subd. 7, authorizing villages to suppress saloons for the sale of liquors.

Certiorari to Wayne; Carpenter, J. Submitted November 22, 1899. Decided December 2, 1899.

Mandamus by George Rattenbury to compel the common council of the village of Northville to approve a liquor bond. From an order denying the writ, relator brings *certiorari*. Affirmed.

Relator, desiring to sell intoxicating liquors at retail under the provisions of the general liquor law of the State, presented to the common council a bond, duly executed, and being in form such a bond as is required to be approved by the common council and filed with the county treasurer before the applicant is entitled to enter upon the business. The respondent was organized under the village incorporation act of 1895 (1 Comp. Laws 1897, chap. 87). The common council refused to approve the bond. Thereupon the relator applied to the circuit court for the county of Wayne for the writ of *mandamus* to compel its approval. That court denied the writ, and the case is now before us for review upon the writ of *certiorari*. In his petition for the writ of *mandamus*, relator alleged that he had purchased certain real estate in the village of Northville, and was reconstructing a building situated thereon into a hotel, and that it was his purpose to conduct therein a hotel; that "he does not intend to keep a saloon for the sale of intoxicating liquors, but he desires to

sell spirituous, fermented, and other liquors in connection with the keeping of said hotel, and the entertainment of guests therein, and as provided by the laws of this State." The answer alleges that "it is the purpose and intention of said relator to conduct a bar for the sale of spirituous, intoxicating, and other liquors in connection with, and as a part of, a hotel." The council refused its approval, "because there is an ordinance on the books of the village suppressing the sale of spirituous and intoxicating liquors." The ordinance provides that "all saloons for the sale of spirituous and intoxicating liquors in the village of Northville shall be prohibited and suppressed," and further provides a penalty for its violation.

C. C. Yerkes (John J. Speed, of counsel), for relator.

T. E. Tarsney and W. G. Fitzpatrick, for respondent.

GRANT, C. J. (*after stating the facts*). In disposing of this case we shall treat the bond as sufficient. The sole question, therefore, is, Is that place in a tavern or hotel, where intoxicating liquors are sold, within the inhibition of the ordinance? The statute provides that villages may, by ordinance, "suppress saloons for the sale of spirituous and intoxicating liquors, and license taverns." 1 Comp. Laws 1897, § 2769, subd. 7. Counsel for relator maintain that the room of a hotel, set apart for the sale of intoxicating liquors at retail, is not a saloon, within the meaning of the statute. The vice aimed at by the statute and the ordinance is the traffic in intoxicating liquors. The paraphernalia of the room in a tavern for selling liquors is the same as that of the place where the proprietor is solely engaged in that business. Its effect upon the community is the same. Probably no village tavern could afford to pay the United States government license and the State tax for the sole purpose of selling liquor to travelers alone. Residents will resort to the hotel saloon as frequently as they would resort to any other saloon. The general liquor law makes no distinction between the tavern keeper or the

grocery man who is a retail dealer in intoxicating liquors and those who engage exclusively in the business. They are all subject to the same regulations and restrictions. The tavern keeper is not restricted to sales to travelers who are his guests. The subterfuges to which many engaged in this business resort in order to evade the law is a matter of common knowledge, and we cannot close our eyes to this fact. It is the business, and not the place where it is carried on, which constitutes the saloon. It is manifest that, were the relator's contention to prevail, the power conferred upon villages to suppress this traffic would be practically annulled. Any one desiring to keep a saloon would set up as a tavern keeper, keeping a few rooms ostensibly for the accommodation of travelers, while his real business is the liquor traffic. Boarding houses would also soon develop into taverns.

The judgment is affirmed.

The other Justices concurred.

KIMBALL v. RANNEY.

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158 1416

1. PRINCIPAL AND AGENT — MORTGAGE FORECLOSURE — PURCHASE OF PRINCIPAL'S PROPERTY BY AGENT.

An agent for the sale of real estate has no right to bid it in for himself at a sale on foreclosure of a mortgage thereon, and, if he does so, equity will require him to account therefor to his principal; and the rule is not altered by the fact that he notified the principal, several days prior to the sale, of his intention to purchase on his own behalf.

2. SAME—RATIFICATION—ESTOPPEL.

The fact that the principal obtained an order for a resale of the premises, and afterwards, being unable to comply with the conditions of the order, or to effect a settlement with the agent, accepted the surplus moneys arising from the sale, and

then waited from three to four years before proceeding against the agent for an accounting, does not amount to a ratification of the sale, or estop the principal from claiming that it inured to his benefit.

3. SAME—LACHES.

Nor is he precluded from obtaining relief because of his laches, where his rights in the premises were at all times denied by the agent.

4. SAME—ACCOUNTING—INTEREST.

In accounting for the proceeds of the transaction, however, the agent should be allowed interest on his disbursements.

Appeal from Wayne; Frazer, J. Submitted October 27, 1899. Decided December 2, 1899.

Bill by James E. Kimball against Frederick T. Ranney and George W. Balch for an accounting and an injunction. From a decree against defendant Ranney alone, both he and complainant appeal. Modified.

George W. Bates, for complainant:

Ranney was disqualified to purchase in his own name while acting as agent for Kimball. 2 Sug. Vend. & P. (8th Amer. Ed.) 406; 2 Pom. Eq. Jur. §§ 959, 1052; 1 Story, Eq. Jur. § 316; Adams, Eq. 61, and cases cited; Greenh. Pub. Pol. 300; *Ingerson v. Starkweather*, Walk. Ch. 346; *Walton v. Torrey*, Har. Ch. 259; *Clute v. Barron*, 2 Mich. 192; *People v. Township Board*, 11 Mich. 226; *Green v. Knoch*, 92 Mich. 26; *Ford v. Wright*, 114 Mich. 122; *Tyler v. Sanborn*, (Ill.) 4 L. R. A. 218, and note; *Church v. Insurance Co.*, 1 Mason, 341; *Grumley v. Webb*, 44 Mo. 444; *Adams v. Sayre*, 70 Ala. 318; *Martin v. Wyncoop*, 12 Ind. 266; *Newcomb v. Brooks*, 16 W. Va. 32. And the notice given by him to Kimball did not operate to terminate the agency. *Bowman v. Officer*, 53 Ia. 640; *Bartholemew v. Leech*, 7 Watts, 472; *Fountain Coal Co. v. Phelps*, 95 Ind. 271; *Michoud v. Girod*, 4 How. 503.

Complainant is not chargeable with laches. *Boyce v. Danz*, 29 Mich. 146; *Allore v. Jewell*, 94 U. S. 506.

To constitute a ratification, the acts relied upon must have been done with knowledge of the law as well as the

facts. 1 White & T. Lead. Cas. p. 237 *et seq.*; 2 Lewin, Tr. 926; 1 Story, Eq. Jur. § 345; 2 Pom. Eq. Jur. § 964; 2 Perry, Tr. § 851; *Murray v. Palmer*, 2 Sch. & L. 474; *Crowe v. Ballard*, 2 Cox, Ch. 253; *Cockerell v. Cholmeley*, 1 Russ. & M. 418; *Wood v. Downes*, 18 Ves. Jr. 120; *Dunbar v. Tredennick*, 2 Ball & B. 304; *Strange v. Fooks*, 4 Giff. 408; *Hoffman Coal Co. v. Cumberland Coal Co.*, 16 Md. 456; *Mulford v. Minch*, 11 N. J. Eq. 16; *Rosenberger's Appeal*, 26 Pa. St. 67; *Campbell v. McLain*, 51 Pa. St. 200; *Boyd v. Hawkins*, 2 Dev. Eq. 195; *Butler v. Haskell*, 4 Desaus. 651.

Gray & Gray (Edwin F. Conely, of counsel), for defendants:

Under the circumstances, there was no disability on the part of Ranney to purchase. *Beedle v. Crane*, 91 Mich. 429; *Rochester v. Lovering*, 104 Ind. 562.

At most, the purchase was only voidable (*Story, Agency*, § 210; *People v. Township Board*, 11 Mich. 229; *Hoyt v. Latham*, 143 U. S. 566; *Marsh v. Whitmore*, 21 Wall. 178; *Bank v. Taylor*, 41 Ala. 100), and as such has been ratified (*Jewett v. Petit*, 4 Mich. 508; *Wilbur v. Flood*, 16 Mich. 40; *Brown v. Miller*, 63 Mich. 413; *Gridley v. Tobacco Co.*, 71 Mich. 528; *Bresnahan v. Ross*, 103 Mich. 483; *Oil Co. v. Marbury*, 91 U. S. 591; *Grymes v. Sanders*, 93 U. S. 55; *Hayward v. Bank*, 96 U. S. 611; *Pence v. Langdon*, 99 U. S. 578; *Mackall v. Casilear*, 137 U. S. 556; *Hammond v. Hopkins*, 143 U. S. 250; *Hoyt v. Latham*, Id. 567; *Hyatt v. Clark*, 118 N. Y. 563; *Scott v. Freeland*, 15 Miss. 409; *Bassett v. Brown*, 105 Mass. 551; *Eckrote v. Myers*, 41 Iowa, 324; *Pridgen v. Adkins*, 25 Tex. 388).

HOOKEE, J. Heath owned certain real estate in the city of Detroit, upon which were two mortgages, aggregating about \$17,000. Ranney, a real-estate agent, was employed by Heath to sell the property, for which he was to receive a commission. There was talk between them that the value of the property would be increased if the council of the city could be induced to fix the location of a proposed street upon this property. Heath became pecuniarily involved, and on June 16, 1893, deeded the property to his father-in-law, Kimball. Kimball testified

that the consideration for this deed was \$1, and that he paid some taxes upon the property, amounting to \$82. He said that there was no bargain, and that the deed was made by Heath and handed to him, and that he supposed he did it to keep it away from creditors, and that he held it for Heath's benefit. On April 28, 1894, at Heath's direction, Kimball signed a contract with Ranney, whereby, "in consideration of services rendered in effecting the sale" of the property, it was agreed that Ranney should receive a commission of 2 per cent. upon a sale of the property for \$22,500, and one-half of any sum received in excess of that price. Ranney was to pay "all expenses or costs of any kind incurred in the sale of said property, and also one-half of any assessment for paving or sidewalk that may be assessed against unsold portion of said property, when said assessment shall become due and payable; said advances being intended as part of the consideration of this contract."

The mortgage held by the Citizens' Savings Bank was in process of foreclosure in chancery, and a sale of the premises thereunder was advertised for July 14, 1894. On July 11, 1894, Ranney wrote the following letter, which Kimball admits receiving:

"DETROIT, July 11, 1894.

"CHARLES J. HEATH and MR. KIMBALL.

"*Gentlemen:* Since my interview with you, I have made up my mind to protect my contract interests in your Woodward-avenue property to the best of my ability at the sale to take place on July 14th inst., particularly as you expressed yourselves unable or unwilling to do so. I shall therefore buy the property, if I can. If I get it, I wish you would come and see me. I may be able to help you.

Yours respectfully,

"F. T. RANNEY."

Kimball testified that he learned of this proposed sale, from Heath, upon the 9th of July, and immediately called upon Ranney, and told Ranney that he could not get the sale "off" (we suppose that he meant "postponed"), and asked Ranney why he did not do it, and stated that he

was his agent to take care of the property; and that Ranney did not make much reply, except that he had made an effort but could not do it. Subsequently Kimball received the letter mentioned above. Kimball then made an unsuccessful effort to get the bank to postpone the sale. The testimony shows that this could have been accomplished if he would have paid some of the interest due. At the sale, Ranney bid in the property, subject to the other mortgage, for about \$40 more than the amount due and costs. Kimball saw him after the sale, and told him he supposed he had purchased it in his (Kimball's) interest as well as his own; and he said, "Oh, no; that is my property now;" and that he did not intend to divide it with them (*i. e.*, Kimball and Heath). Kimball then said, "Haven't I got any time to redeem the property?" and Ranney, after talking over the telephone to Mr. Gray, solicitor for the complainant in the foreclosure proceeding, reported that he had eight days. Ranney procured the money to pay for the property from his father-in-law, Mr. Balch, and gave him a deed of the property by way of security. He subsequently obtained from him money with which he paid the other mortgage, by giving him additional security. Kimball thereupon employed counsel and made an application for a resale, and this was granted upon condition that Ranney should be paid \$500 for his services (*i. e.*, interest in the property under the contract), and that a deposit should be made to secure a promised bid for the property. These conditions were not complied with, and finally an order of confirmation was entered under a stipulation reading as follows:

"It is hereby stipulated and agreed that, in the foreclosure proceedings of the Citizens' Savings Bank, referred to in the record in this cause (file No. 13,565 of the circuit court for the county of Wayne, in chancery), James E. Kimball, on August 25, 1894, filed a petition for the payment to him of the surplus moneys, of \$40.35, in court, a copy of which is hereto attached, and that on the same day an order directing such payment was entered, a copy of which is also hereto attached, and that on the same

day said surplus was paid to him, and that the same should be considered and read in evidence upon the hearing of this cause, as if the same appeared in the return now on file."

As shown by the stipulation, Kimball received the surplus paid for the land by Ranney, amounting to \$40 or more.

The street-opening matter finally passed the council, and proceedings to condemn the land commenced late in the fall of 1894, according to Ranney's testimony. A year or so later, proceedings were begun by Ranney against the city, and these were finally settled in this court in his favor. On July 23, 1895, a portion of the property was sold to Mrs. Davis for \$8,500; and on May 30, 1896, Ranney sold his equity in the property to Balch, upon a settlement of their affairs. The bill in this cause was verified February 10, 1898, and asks an accounting by Ranney, and an injunction against the selling or incumbering of the premises by Ranney or Balch. The circuit court granted the relief prayed against Ranney, and dismissed the bill as to Balch. Both complainant and defendant Ranney have appealed.

The learned circuit judge found that the contract did not require Ranney to see that the property was not sold upon the mortgages, but it was his opinion that the relation which he sustained to the property was such as to forbid its purchase upon his own behalf, to the exclusion of the complainant, and to make him a trustee for the benefit of the complainant when he acquired title. It is admitted that one who contracts to sell property for another cannot purchase for himself; but counsel assert that this is not such a case, for the reason that he did not sell to himself, or, indeed, sell at all, and that he purchased at a sale which he was powerless to avert, and only did so to protect himself against loss.

The doctrine invoked by the complainant goes further than to merely forbid a purchase by an agent from himself, and extends to all cases where the purchase by an

agent may be an inducement to omit a duty regarding the subject of the purchase. In *Grumley v. Webb*, 44 Mo. 444, it was held that an agent cannot be allowed to purchase an interest in property where he has a duty to perform which is inconsistent with the character of a purchaser. In that case the agent took a lease to himself, instead of a renewal of a former lease to his principal. In *Martin v. Wyncoop*, 12 Ind. 266, it was held that an administrator could not purchase real estate of his testator at a sheriff's sale, for himself or another, even though it was sold on an execution in his favor levied before he assumed the trust, and although it appeared that he used efforts to make the property sell for the best price possible. The case of *Fountain Coal Co. v. Phelps*, 95 Ind. 271, affirms the doctrine. In *Adams v. Sayre*, 70 Ala. 318, Adams was Sayre's agent having control and possession of mortgaged premises, and performing the duty of managing and renting them, etc., and was his authorized agent to sell the property. He purchased the property at a foreclosure sale, and it was held that his relation was a fiduciary one as regarded the property, and that he was not permitted to traffic with the subject-matter of his agency, without the consent of his principal, so as to reap a profit for himself. It was said, "The appellant was the agent of the mortgagor to sell the property, and this relationship imposed on him the manifest duty of obtaining for it the highest available price."

In *Newcomb v. Brooks*, 16 W. Va. 32, it was laid down as a general principle that "a person who occupies any fiduciary relation to another is bound not to exercise for his own benefit, and to the prejudice of the party to whom he stands in such relation, any of the powers or rights, or any knowledge or advantage of any description, which he derives from such confidential relation," and that a purchase under such circumstances could be set aside by the principal at his pleasure, without any inquiry as to adequacy of price or fairness of the transaction. This is upon the principle stated by Lord Eldon (*Ex parte Lacey*, 6 Ves. 627), that:

"Though you may see in a particular case that he [the trustee] has not made advantage, it is utterly impossible to examine, upon satisfactory evidence in the power of the court (by which I mean in the power of the parties), in ninety-nine cases out of a hundred, whether he has made advantage or not. * * * The probability is that a trustee who has once conceived such a purpose will never disclose it, and the *cestui que trust* will be effectually defrauded."

Mr. Justice Wayne said in *Michoud v. Girod*, 4 How. 555:

"The general rule stands upon our great moral obligation to refrain from placing ourselves in relations which ordinarily excite a conflict between self-interest and integrity. It restrains all agents, public and private; but the value of the prohibition is most felt, and its application is more frequent, in the private relations in which the vendor and purchaser may stand towards each other. The disability to purchase is a consequence of that relation between them which imposes on the one a duty to protect the interests of the other, from the faithful discharge of which duty his own personal interests may withdraw him. In this conflict of interest the law wisely interposes. It acts not on the possibility that in some cases the sense of that duty may prevail over the motives of self-interest, but it provides against the probability in many cases, and the danger in all cases, that the dictates of self-interest will exercise a predominant influence, and supersede that of duty. It therefore prohibits a party from purchasing on his own account that which his duty of trust requires him to sell on account of another, and from purchasing on account of another that which he sells on his own account. In effect, he is not allowed to unite the two opposite characters of buyer and seller, because his interests when he is the seller or buyer on his own account are directly conflicting with those of the person on whose account he buys or sells."

In the case of *Newcomb v. Brooks*, *supra*, it was said further that:

"This rule is not confined to trustees and fiduciaries, in the technical meaning of the words, but it extends to every person who is within the reason of the rule,—that is, to every person who by his connection with another

person, or who by being employed or concerned in his affairs, has acquired a knowledge of his property; and any such person occupying such confidential relation to another comes within the rule we have laid down. In other words, the rule embraces every relation in which there may arise a conflict between the duty which the purchaser owes the person with whom he is dealing and his own individual interest."

Numerous authorities are there cited in support of the rule. It was held that:

"A fiduciary cannot make a valid purchase of the trust property, though it be made at a public judicial sale under a decree made in an adverse proceeding. Any such purchase may be avoided, at his option, by any party to whom he holds such fiduciary relation."

See *Ford v. Wright*, 114 Mich. 122.

It is urged in behalf of the defendant that all of these cases involve elements of fraud; but it is evident that the decisions were not based upon findings of actual fraud, but rest upon the more solid and sweeping proposition that a trustee cannot deal to his own advantage with the trust fund without the consent of the *cestui que trust*. Subjected to the test of this rule, we think that Ranney had no right to purchase this land, to the exclusion of the complainant, because he had duties that were incompatible with it. He was bound to sell this property as speedily and as advantageously as possible. As a purchaser, his interest was to buy as cheaply as possible. Whether yielded to or not, the impending foreclosure sale, at which he might purchase, presented a temptation to omit the performance of these duties, and delay action until the property should become his, whereby he, and not Kimball, would reap the profit arising from a sale. There is evidence in the case, by both Heath and Kimball, that defendant led them to expect, if he did not promise, that he was able to, and would, protect the title for their mutual benefit. At a late day he informed them that he could not; yet in a very few days afterwards he obtained the

money which would have protected it, by taking title and giving security upon the property. It cannot be denied that he gave complainant notice that he would purchase the property for his own benefit, while there was yet 12 or 13 days within which he might have redeemed, but he was unable to do it. We think it did not change the relations, or make the title valid, any more than it would have done had he given him that period to redeem after a confirmation of a purchase made without complainant's knowledge. The edge is sought to be taken from the rule by the claim that Ranney found it necessary to do this for the protection of his rights under the contract. His rights under the contract consisted of a prospective commission, to earn which he had made effort, and possibly expended some money, though the latter does not appear. But the sequel has shown, what must have been apparent then, that he could safely have taken care of his own rights without depriving the complainant of his.

Kimball obtained an order for a resale, and finding that he could not comply with the conditions, or that it would not pay him to do so, took the surplus of the purchase price, and then waited three or four years before instituting proceedings. It is contended that these things amount to a recognition of Ranney's rights, and a ratification of the sale, and that in any event his laches should estop him from making this claim. The record shows that complainant tried to adjust this matter satisfactorily. He applied for a resale in the hope that he could save something from the property after his vain effort to effect a redemption within the short period allowed. He sent his attorney to Ranney, offering to pay the amount of his bid and \$100 additional for the redemption of the property, but was refused. After the sale was confirmed, he or his counsel took the money remaining after payment of the mortgagee, but for this he is ready to account. We think these things do not estop him from claiming that Ranney bought the property for their mutual benefit. Ranney has not relied upon, or been misled or injured by, them.

Nor do we think the defense of laches should prevail.

Ranney was under no obligation to buy this property. He professes to have done so for his own benefit, but so does any agent who buys his principal's land with a view to profit. At all events, he bought it, and the law says that he purchased for the benefit of his *cestui que trust*. Ordinarily a purchase with such design is meritorious, and the trustee is only required to give the *cestui que trust* the proceeds. But here there was no such design, and, upon the contrary, the trustee has set up, and at all times maintained, an unlawful claim. He now says, in effect, that such gratuitous interference gave him the right to say to complainant: "I now have a deed of your property. You must at once relieve me of this burden which I have voluntarily assumed, or your laches will make my title perfect." We do not take this view of the matter. For his own purposes, Ranney chose to take the property, trusting to his ability to realize from it. He did not ask complainant to relieve him from his burden. On the contrary, he denied his right to do so, and refused the offer made by complainant's solicitor, which appears to have been made in good faith, and in the belief that it could be performed. He told complainant the land was his, subject to a right to redeem within eight days. When asked if he "would send complainant to the poorhouse," he replied that "business is business." Thereupon he was allowed to sell the property, and complainant now asks the court to give him the trust fund. We concur in the opinion of the circuit court that he is entitled to what is left after reimbursing Mr. Ranney. In addition to the items allowed Mr. Ranney by the decree, we think that he is entitled to interest upon his disbursements, the amount of which should be deducted from the amount of decree. The decree of the circuit court will be modified in this particular, and in other respects affirmed. As the record contains no computation of the amount to be deducted for interest, it will be determined on the settlement of the decree, if counsel do not sooner agree upon it. The defendant will recover costs of this court.

The other Justices concurred.

PHELPS v. CHICAGO & WEST MICHIGAN RAILWAY CO.

RAILROADS — INJURY TO EMPLOYÉ — STRUCTURE NEAR TRACK —
ASSUMED RISK.

A brakeman who, while riding on the side ladder of a freight car, upon the main track, was injured by coming in contact with a fish-chute erected beside the track, at a point near a station, but outside of the yard where trains were made up, is not precluded from a recovery, as a matter of law, on the ground that he assumed the risk of such injury, where, although the chute was in plain view, he was unacquainted with the surroundings; though the rule would be otherwise had the accident occurred by reason of such a structure abutting upon a side track.

122	171
f122	236
f122	239

122	171
s81W	101
s84W	66

122	171
s81W	101
s84W	66
132	540
188	569

122	171
145	514

122	171
154	432

Error to Grand Traverse; Corbett, J. Submitted January 3, 1899; opinions filed December 12, 1899. Rehearing granted September 24, 1900; former decision reversed November 13, 1900.

Case by George W. Phelps against the Chicago & West Michigan Railway Company for personal injuries. From a judgment for plaintiff, defendant brings error. Affirmed.

Smith, Nims, Hoyt & Erwin, for appellant.

Dodge & Covell, for appellee.

LONG, J. Plaintiff was a brakeman in the employ of the defendant company. For two years prior to the accident complained of, he had been employed by the defendant as a yard-master in its yards at Traverse City; but on Friday preceding April 27, 1896, he had been transferred from that work to brake on a freight train running from Traverse City to Petoskey and Bay View. At Petoskey the defendant's road is located near to, and conforms to, the bay. On the northerly side of the track, and about 40 feet from it, was located a fish-house, for the storage and

packing of fish. Leading from the platform of the fish-house to the railroad side track was an inclined platform or chute, about 4 feet in width, constructed of planks, and about the height of the floor of a car, over which fish-cars were run between the fish-house and the defendant's cars. This chute extended up to within 12 or 13 inches of the side of the freight cars standing on the side track. On April 27, 1896, the plaintiff made a trip to Petoskey as a brakeman. When the train reached Petoskey, two box cars were standing on the side track northerly from this fish-chute. These cars were to be moved upon the main track. For that purpose the engine was run north to the switch opening into the side track; and, after the switch was thrown by the plaintiff, he coupled the engine to the cars, then got upon the first car, walked on the top of it, and got down onto a ladder attached to the side of the other car, next to the fish-chute. The plaintiff stood on the lower step of the ladder, held onto it with his left hand, and with the other took hold of a lever at the end or corner of the car for the purpose of uncoupling the cars; his intent being to cut off the car upon which he was standing before it got onto the main track. After the cars were under motion, he attempted to uncouple, and while in this act his body came in contact with the fish-chute, and he was forced between it and the car, and seriously injured.

Plaintiff testified that this was the first time he had ever done any work in that yard; that he did not see the fish-chute, and had no knowledge it was there. The court charged the jury that it was the duty of the railway company to provide a reasonably safe place for its employes in the performance of the duties in which they were employed; and if the jury found from the evidence that the fish-chute was built so near the main track of defendant's road that there was not sufficient room for persons to pass between it and an ordinary box car moving upon the track, and the plaintiff, without fault on his part, was unconscious of the conditions there, and was injured as claimed,

he would be entitled to recover. The jury returned a verdict in favor of the plaintiff for \$500. Defendant appeals.

Defendant contends that the plaintiff must have known from his experience that all railroads have platforms where they handle freight at freight houses; that this fish company was shipping a large amount of fish over this road; that in going from the depot, either in riding upon the pilot or the gangway of the engine, to the switch, plaintiff was facing this fish-chute, and must have seen the situation there in passing it; that, had he looked at the fish-house, he must necessarily have seen the chute; that he was guilty of contributory negligence in not having seen it in passing by, as it was broad daylight at the time of passing; that it was his duty to be watchful for his personal safety; and that, in the absence of knowledge of his surroundings, there was an increased duty to use his senses, and not proceed blindly with his work. Defendant asked the court to charge the jury:

“Even though the plaintiff did not actually know of the presence of said fish-chute, if the same was in plain view, and the danger in attempting to pass by the same, riding on the side of the car, was apparent, and the plaintiff failed to see the fish-chute and to apprehend the danger, it was his own fault, arising from his inattention or failure to note his surroundings when he got on the ladder on the side of the car; and, if you find this condition to be true, then you are instructed, as a matter of law, that the plaintiff would not be entitled to recover.”

This was refused. The court charged the jury upon this subject that:

“It was the duty of the plaintiff to use reasonable care and caution in the performance of his labors as brakeman, and, to that end, he was required to make close and careful observations as to the main and side tracks, and note all objects of danger situated at or along the same; and if he failed to do so, and afterwards sustained an injury on account of not seeing or observing such obstruction or object, then you are instructed, as a matter of law, that said plaintiff cannot recover, and your verdict should be for the defendant.”

Also, the court charged :

"The defendant's claim or theory is that the presence of the fish-chute was known to the plaintiff, and that he thoughtlessly took his position on the side of the car, and without looking was carried forward against said chute, and thereby injured, and that said injury would not have happened but for the inattention of said plaintiff. Now, you are instructed, as a matter of law, that if you find this theory of defendant to be true, your verdict should be in its favor."

The testimony clearly shows that, had plaintiff looked, he could have seen this fish-chute. It was not negligence for the defendant to place it there for the convenience of its business. It was no more a dangerous object than a platform of the same height would be, placed as near this side track, and was as plainly to be seen. The plaintiff, in engaging as a brakeman, assumed the risks incident to such employment; and we think this was one of the assumed risks. Elliott, in his work on Railroads (volume 3, § 1290), lays down the rule of assumed risks as follows:

"The employé assumes all the risks of the service in which he voluntarily engages, except such as arise from negligence on the part of the employer; so that, in whatever form the question may arise, the general rule must be that risks of the service shall not be increased or caused by the employer's negligence; but risks not increased or caused by the employer's negligence are risks of the service which the employé assumes. The test is not danger, but negligence on the part of the employer."

At section 1269 the same author, after speaking of the rules laid down by courts in the different States in reference to structures so near the tracks as to endanger the safety of employés while engaged in the performance of their duties, continues:

"It seems to us that where the employé has knowledge, or is chargeable with knowledge, of the existence and situation of such structures, he assumes the risk of dangers from them; for we can see no reason why the general rule

that an employé assumes the risk of the dangers of the service does not apply. * * * Some of the courts seem to require proof of actual knowledge in order to exculpate the employer, but we think this view erroneous; for, if the facts are such as make it negligence on the part of the employé not to know, there can be no recovery."

This was the rule laid down by this court in *Illick v. Railroad Co.*, 67 Mich. 632; *Pennington v. Railway Co.*, 90 Mich. 505; *Manning v. Railway Co.*, 105 Mich. 260; *Ragon v. Railway Co.*, 97 Mich. 265 (37 Am. St. Rep. 336). This rule is fully sustained by the Massachusetts cases. *Austin v. Railroad Co.*, 164 Mass. 282; *Lovejoy v. Railroad Co.*, 125 Mass. 79 (28 Am. Rep. 206); *Goodes v. Railroad Co.*, 162 Mass. 287; *Content v. Railroad Co.*, 165 Mass. 267; *Ryan v. Railroad Co.*, 169 Mass. 267; *Bell v. Railroad Co.*, 168 Mass. 443. This same rule is recognized by the courts of Iowa, Indiana, and New York. *Brown v. Railway Co.*, 69 Iowa, 161; *Pennsylvania Co. v. Finney*, 145 Ind. 551; *Gibson v. Railway Co.*, 63 N. Y. 452 (20 Am. Rep. 552). It may be said that the rule here laid down is in conflict with *Sweet v. Railroad Co.*, 87 Mich. 559. In that case I am of the opinion that the rule of assumed risk was overlooked, and that the case went off on the principle of the master's duty to furnish a safe place for his employés. At least, the case has not since been followed by this court, as reference to *Pennington v. Railway Co.*, 90 Mich. 505, *Manning v. Railway Co.*, 105 Mich. 260, and *Ragon v. Railway Co.*, 97 Mich. 265 (37 Am. St. Rep. 336), illustrates.

Under the circumstances shown by this record, the court should have directed the verdict in favor of defendant.

Judgment reversed, and a new trial ordered.

GRANT, C. J., and HOOKER, J., concurred with LONG, J.

MOORE, J. (*dissenting*). I cannot agree with the opinion written by Justice LONG. In addition to the

statement of facts contained in his opinion, it ought to be said the fish-house is not near the freight depot or platform. The fish-chute was built in two sections. The section nearest the platform of the fish-house was removable, so that a team could be driven between the platform of the fish-house and the permanent portion of the chute. There was a short toe door to reach from the solid portion of the chute to the floor of the car which was to be loaded. It is very clear, from the testimony, there was nothing in the way of making the toe door longer, and the solid portion of the chute shorter, so as to insure the safety of the railway employ  s when they were discharging the duties incident to their employment. If the safety of the men had been given as much consideration as was given to the convenience of those who wanted to reach the platform of the fish-house with teams, the chute would have been built upon different lines. The case is clearly within the principles laid down in *Sweet v. Railroad Co.*, 87 Mich. 559. It is suggested that this case was not followed by the later cases in this court, and that they justify the opinion written by Justice LONG. I do not so read the cases. In the case of *Pennington v. Railway Co.*, 90 Mich. 505, it was held there was a fatal variance between the declaration and the proofs. The opinion shows:

“The deceased was familiar with all the surroundings. He knew that the train was in motion; that, if it did not stop, he must strike this post, which was less than 20 feet distant. * * * There is no evidence nor claim that the rules of the defendant required the deceased to descend from the cars when in motion in this dangerous place.”

The case is easily distinguishable from the case of *Benage v. Railway Co.*, 102 Mich. 72. In that case deceased was riding in a confessedly unsafe place, in violation of the rules of the company, and when a safe place had been provided for him. The court said that, as a matter of law, under such circumstances the deceased was guilty of contributory negligence. Nor is the case of

Manning v. Railway Co., 105 Mich. 260, controlling. It was claimed the deceased was killed by striking a tree near the track. It appears by the opinion that "there was an utter lack of evidence in the case to show that the deceased came to his death in the manner set out in the declaration." It also appeared that :

"The road ran through a piece of woods. It was in process of construction, and not yet finished. The deceased was 24 years of age, and accustomed to work at that kind of work. The trees were along the track on either side, and in plain view. The tree in question was plainly visible. The deceased, when he entered the employ of the defendant, knew that he was to work upon a construction train, and could see at a glance that the road was not finished, and that trees bordered it on either side. As a general rule, it is the duty of a railway company to furnish its employes a safe place to work while operating its trains; yet the rule must be considered with some qualifications when a new road is being built. The employe cannot complain of the imperfect condition of a road he is employed to assist in making perfect. He must take the risks naturally incident to such employment. He assumes greater risks upon such a road than upon a completed one, where he might expect that the track was clear and all obstructions removed."

In the case at bar the plaintiff was in the discharge of the duties incident to his employment. He was performing them in the usual way they are performed when operating cars upon the main line. The accident occurred upon the permanent track of an old road. The plaintiff claimed, and the jury found, that he knew nothing of the existence of this dangerous structure, either from observation or from having been warned of its existence. The testimony of the plaintiff brought the case within the general rule of a safe place in which to work. The judge carefully laid down the rules of law which should govern the case. I think the judgment should be affirmed.

MONTGOMERY, J. I think the question of assumed risk a proper one for the jury.

ON REHEARING.

LONG, J. A motion for rehearing has been granted in this case; and, upon further consideration, we are now satisfied that the fish-chute complained of abuts upon a part of the main track, and not upon the side track, as held in the former opinion, and that such main track upon which the fish-chute abuts is not within the yards of the defendant company. The rule is very different than where such obstruction abuts upon a side track. Such conveniences near side tracks, or abutting on them, are usually necessary for the conduct of railroad business, and, in making up trains, brakemen and switchmen must be on the lookout for them; while, where they abut on the main track, and not in yards where trains are usually made up, servants of railroads may expect that such obstacles will not be placed in so close proximity to the track as to make them dangerous. The plaintiff was not familiar with the surroundings, and had had no opportunity to make himself familiar with them. The rule might be different had he been familiar with the position of the chute. For these reasons, the judgment must be affirmed.

The other Justices concurred.

POTTER v. DETROIT, GRAND HAVEN & MILWAUKEE RAIL-
WAY CO.

1. RAILROADS—INJURY TO EMPLOYÉ—PLEADINGS AND PROOFS—
VARIANCE.

Where, in an action against a railroad company for personal injuries, brought by a brakeman who was struck, while climbing the side ladder of a car, by a telegraph pole alleged to have been placed too near the track, the declaration averred that it was necessary for him to ride on the ladder, and the proofs showed only that he was expected so to ride when climbing to the top of a car, there was no such variance as would work a surprise to defendant.

2. SAME—POST NEAR TRACK—ASSUMED RISK.

It cannot be said, as a matter of law, that a railroad brakeman assumed the risk of injury from coming in contact with a telegraph pole negligently placed so near to a side track as to prevent him, when riding on the side ladder of a car, from passing it in safety, where, though it appears that he had walked by the pole and had ridden by it on the tops of cars several times previous to the accident, it further appears that the other poles along the line were not so placed, and it is not shown that he had actual knowledge of the dangerous proximity of the pole in question. LONG, J., and GRANT, C. J., dissenting.

3. SAME—RIGHT OF ACTION—RELEASE—CONSIDERATION.

A release given by a brakeman to a railroad company, reciting that he had received certain injuries, and that, to avoid litigation, he, in consideration of re-employment by the company for such time as might be satisfactory to it, released such company from all claims for damages for such injuries, is without consideration, where he was, at the time it was given, in the employ of the company.

ON REHEARING.

TRIAL—MISCONDUCT OF COUNSEL—ARGUMENT TO JURY.

Where the trial judge does nothing to check plaintiff's counsel in the use in his argument of language so intemperate and improper as to be prejudicial to defendant, it is reversible error.

122	179
122	661

122	179
d125	256

122	179
s81W	424

122	179
f152	149

Error to Shiawassee; Smith, J. Submitted January 3, 1899; opinions filed December 12, 1899. Rehearing granted January 23, 1900; former order vacated April 3, 1900.

Case by Frank A. Potter against the Detroit, Grand Haven & Milwaukee Railway Company for personal injuries. From a judgment for plaintiff, defendant brings error. Reversed.

E. W. Meddaugh (*Geer & Williams*, of counsel), for appellant.

Watson & Chapman, for appellee.

MONTGOMERY, J. The plaintiff was an employé of the defendant as a freight brakeman. On the 17th of September, 1892, in the evening, at about 8:30, the train arrived at Milwaukee Junction, where two cars, standing on the "East Y," so called, were to be attached to the train, and pulled over a switch that led off the main track to the east Y. Plaintiff turned the switch, gave the signal for the train to back down on the east Y, where the cars to be taken on were, preceded the train down the Y, and made the coupling. The conductor gave the signal to go ahead. Plaintiff testified that he started to climb up the side ladder of the car, and had gotten part way up, when he was struck by a telegraph pole, and injured somewhat seriously. The testimony shows that plaintiff had been in the employ of defendant as a spare brakeman for 9 days during March and 19 days during April of the same year, and again from May 3d to some time in June, when he went to Pontiac; that he returned to work for the company in August, and worked on a passenger train during that month, and until September 14th; that on the 15th of September he left Detroit for Holly on a freight train, returned to Detroit on the morning of the 16th, and was at Milwaukee Junction at about 4:50 a. m. While doing work as a freight brakeman, the plaintiff passed Milwau-

kee Junction frequently, and took on cars there. He testified that he did not do any coupling at the east Y, but the testimony is quite convincing that he did. He testified that he had no knowledge that this pole was near enough to the track to be dangerous. From a judgment for plaintiff, defendant appealed.

It is contended that there was a fatal variance between the proof and the declaration. The declaration was as follows:

“And for that whereas, on, to wit, the 17th day of September, 1892, said plaintiff was, and for a long time previous thereto had been, employed by said defendant as brakeman on its cars in the yard at Milwaukee Junction, a station along the line of said railroad; and, in the performance of the duties imposed on said plaintiff by said defendant in the employment aforesaid, it became and was necessary for said plaintiff to ride back and forth in said employment on the side of the railway cars, clinging to the steps or ladders placed on the side of said cars by said company for that purpose, and which is the usual manner of performing and going to and from the work in and about which plaintiff was employed. * * * But, notwithstanding the duty aforesaid of the said defendant, it wholly neglected and refused to perform such duty towards said plaintiff, in that it placed and permitted to remain a post or telegraph pole so near one of the tracks of said railway in said yard that, while said plaintiff was in the performance of his duty, and while riding along on the side of one of the defendant's cars, as aforesaid, he would be struck by said post or pole, and there was not sufficient room between said car and said post or pole to allow the body of said plaintiff, while engaged in his duties as aforesaid, to pass without injuring him. * * * And while in the performance of his duty, as aforesaid, and while riding on the side of a moving car, as aforesaid, in the performance of such duty, he was struck by said post or telegraph pole, negligently left standing by said defendant so near its track in said yard, and was knocked from the side of said car,” etc.

There was testimony that it was necessary to climb up the ladders of the cars while in motion, but the evidence did not show that the brakemen were expected to ride on

the sides of the cars except in this way. The testimony was not objected to, but at the close of the case the defendant's counsel asked an instruction that there was a fatal variance. We think the proofs tended to support the averments. It is true that the evidence failed to show that the plaintiff could have properly ridden continuously on the side of the car, but the proof indicated that he might lawfully ride there while ascending to the top of the car. We do not think there was such a variance as to work a surprise to defendant.

It is next contended that the plaintiff assumed the risk of contact with the telegraph pole, and that a verdict should have been directed on that ground. In this connection it is insisted that the evidence shows conclusively that the plaintiff either knew, or should have known, of the proximity of this pole to the track, and testimony which is very convincing, if not conclusive, is cited to show that plaintiff had on previous occasions assisted in taking cars off the east Y; and if this fact were enough to establish that plaintiff either knew, or from the nature of his employment ought to have known, that this pole was located so near the track as to be dangerous, we should be inclined to assent to the contention of counsel. But we are not prepared to say that if the plaintiff had the opportunity which would be afforded by walking past this pole, or riding back and forth on the tops of cars, he was bound to make so close an inspection as would enable him to discover that the pole in question, instead of being in a safe location, was a few inches too near the track.

It is, however, contended that, as matter of law, the plaintiff must be held to have assumed the risk of such structures near the track as the pole in question. It is said that the principle which plaintiff's counsel invoke, that it is the duty of the master to provide a safe place for his employes to work, is not applicable; that—

“That principle properly has reference solely to the adequacy of a structure or device that the employer has provided for use of the employé, and in or upon which the

employé has to do his work, or to the hazards which the employé may be subjected to through the employer's negligence in conducting operations on or about the place while the employé is at work."

If we correctly understand this contention, we think it makes for a rule much too narrow. A place may be rendered unsafe as well by being so placed with reference to adjacent objects as by inherent defects in the place or device itself. We have no hesitancy in saying that, if we leave aside the question of assumed risk for the moment, a railroad company which, without necessity, locates telegraph poles so near to the track over which its employés are required to operate its trains as to render it unsafe for such employés to operate the trains in the ordinary way, without meeting with injury from such structures, has failed in its duty to provide a safe place. *Walsh v. Navigation Co.*, 10 Or. 250; *Illinois Central R. Co. v. Welch*, 52 Ill. 183 (4 Am. Rep. 593); *Johnson v. Railway Co.*, 43 Minn. 53; *Houston, etc., R. Co. v. Oram*, 49 Tex. 341; *Chicago, etc., R. Co. v. Russell*, 91 Ill. 298 (33 Am. Rep. 54); *Whipple v. Railroad Co.*, 19 R. I. 587 (61 Am. St. Rep. 796); *Scanlon v. Railroad Co.*, 147 Mass. 484 (9 Am. St. Rep. 732); *Sweet v. Railroad Co.*, 87 Mich. 559; *Allen v. Railway Co.*, 57 Iowa, 623 (5 Am. & Eng. R. Cas. 620).

The employé is, however, held to assume the risk of injury from such structures as he knows of, or ought, in the exercise of common prudence, to be acquainted with, and the difficulty in any given case is chiefly in determining whether the obstruction belongs to this category. In applying the rule of assumed risks, the courts have not always been consistent, and different courts have reached different results on the same state of facts. A brief review of some of the cases may be of interest. In Massachusetts, in *Lovejoy v. Railroad Co.*, 125 Mass. 79 (28 Am. Rep. 206), it appeared that a signal post was placed 3 feet and 8 inches from the track, and plaintiff, an engineer, while leaning out of his cab, looking for a

signal, came in contact with it, and was injured. It appeared that the abutments of 46 bridges, numerous buildings, entrances to stations, and other structures on the line of the defendant's road, were the same distance from the track. These facts were known to the plaintiff, although he had not, previous to the injury, noticed this particular post. It was held that if there was any danger to the plaintiff, while he was in the performance of his duty, from the structures so placed, it was a risk he assumed. The court said, "He knew the manner in which the road was constructed, the proximity to the track of these structures, and the methods employed in the management of the trains." In *Fisk v. Railroad Co.*, 158 Mass. 238, it appeared that plaintiff, a freight brakeman, was injured by contact with an overhanging awning at a station. All the principal stations on the road had such awnings, and plaintiff knew there was an awning at the station where he received his injuries. It was held that he assumed the risk. The case of *Scanlon v. Railroad Co.*, 147 Mass. 484 (9 Am. St. Rep. 732), illustrates the distinction made by the Massachusetts court. Plaintiff, a brakeman, came in contact with a signal post 3½ feet from the track. He had no previous knowledge of the proximity of this post or other objects to the track. Defendant showed that an examination of the permanent structures along the line of the road disclosed that several structures were as near the track as the post in question; but the court said:

"The danger, the risk of injury, which it is claimed the plaintiff assumed, was not the particular danger from the post which caused the injury, but the general danger from the structures and erections near the track. The plaintiff had no actual knowledge of the danger, and he cannot be held to have assumed the risk of it unless the character of the danger and the circumstances are such as to show that he ought to have known and appreciated it. The fact that it was incident to the employment is not sufficient. Peril from dangerous machinery, or appliances, or structures is incident to employment upon them,

but the risk is not assumed by the employé unless he knows the danger, or unless it is so obviously incident that he will be presumed to know it."

In *Illinois Central R. Co. v. Welch*, 52 Ill. 183 (4 Am. Rep. 593), the plaintiff, a brakeman, was injured by an overhanging awning. It was said by the court:

"There are many freight depots and station houses upon the line of the Central Railway, and it would be preposterous in us to say, or to ask a jury to say, that a brakeman engaging in the service of the company must be held to know whether or not there may be one among them whose roof or awning so projects over the line of road that a brakeman on a freight train, in the performance of his duties, would be liable to be swept from the train by collision with it."

See, also, case of *Chicago, etc., R. Co. v. Russell*, 91 Ill. 298 (33 Am. Rep. 54),—a case of an injury by a telegraph pole.

In North Dakota, in the case of *Boss v. Railroad Co.*, 2 N. Dak. 128 (33 Am. St. Rep. 756), it appeared that a switch target was located so near to the track that an employé was struck by it. The company was held liable. As to plaintiff's duty the court said:

"Nor can we say that plaintiff, in the ordinary exercise of his faculties, was bound to know the condition of that switch-stand. It is true that he had passed it upon this train nearly every day for two weeks, but he had no duty to perform in connection with the running of the train; nothing in any manner that would be likely to call his attention to the condition of this switch-stand."

In Wisconsin the test of liability seems to be whether the obstruction or structure dangerously near to the track was necessarily placed there. In *Kelleher v. Railroad Co.*, 80 Wis. 584, an employé was injured by coming in contact with a coal-shed 22 inches from the side of the car. The plaintiff was held entitled to recover. The court say: "It is objected that the true test is not whether it was 'unnecessarily' dangerous, but whether it was unreasonably dangerous. This contention cannot prevail.

It is settled in this State that the duty of the company is to see that its tracks are not so obstructed as to render the duties of its employés unnecessarily hazardous,"—citing *Dorsey v. Construction Co.*, 42 Wis. 583, in which case it was held that, although plaintiff had passed the structure every day for five months, the question of whether he ought reasonably to have known of the danger was for the jury. In *Scidmore v. Railway Co.*, 89 Wis. 188, the court held that the maintenance of a clearance post was not negligence, and that the plaintiff, knowing that such posts were maintained by the defendant, could not recover for injuries received by coming in contact with one of them. The holding of the latter position is consistent with all the cases, including those cited from Massachusetts; but the holding that the maintenance of the clearance posts so near the track was not negligence can only be reconciled with the earlier Wisconsin cases on the ground that such posts are *necessarily* placed thus close to the track.

In Kansas the duty of the company to refrain from placing structures so near the track as to cause unnecessary peril to the employé is maintained. The court, in *St. Louis, etc., R. Co. v. Irwin*, 37 Kan. 701 (1 Am. St. Rep. 266), recognizing the rule of assumed risk, say:

"The law, however, does not require that an employé shall know of all defects or obstructions that may exist on the road, or in the service in which he is engaged; and it cannot be said that the peril in this case was so obvious and patent that Irwin must have known it. He had a right to assume that the company had done its duty, and placed its track in such a condition that he could perform his duties with reasonable safety."

In *Johnston v. Railway Co.*, 23 Or. 94, deceased was a switchman. He was injured by being struck by a target pole so near the track as to strike him as he passed by on the side of the car. A recovery by the executor was sustained. As to assumed risk, the court said:

"It is not expected of a switchman that he should care-

fully measure the distance between a switch target and the rail. This is the duty of the master, and the servant has the right to assume that the target or other obstruction is at a reasonably safe distance, in the absence of anything to excite special apprehension of danger."

The same rule obtains in Texas. In *Bonner v. La None*, 80 Tex. 117, it was held that a railway company is responsible to one of its employés for negligently constructing a target so close to the track as to cause injury to the employé while in the line of his duty, if the employé could not reasonably have anticipated the danger. And, on the other hand, it is held that, if the employé knows of the conditions, he takes the risk. *Missouri, etc., R. Co. v. Somers*, 71 Tex. 700. In the latter case the court state the rule as follows:

"The employés of the company are not called upon to inspect the machinery, roadbed, or cattle-guards. It is the duty of the company to have all these inspected, and to know that they are reasonably safe, and the employé has the right to rely upon its discharge of that duty. But when he is aware that a large number of cattle-guards are dangerous, and in this regard they are substantially alike, so far as his knowledge extends, he must know better than to rely upon the safety of any of them."

In Indiana the rule is the same. In *Louisville, etc., R. Co. v. Wright*, 115 Ind. 378 (33 Am. & Eng. R. Cas. 370, 7 Am. St. Rep. 432), the case of *Illinois Central R. Co. v. Welch*, 52 Ill. 183 (4 Am. Rep. 593), is cited with approval, and the court add:

"A person contracting to work upon a railway as a brakeman assumes the risks ordinarily and properly incident to such service, but he does not, by such hiring, assume the risk of unusual dangers of which he has no knowledge, or of which he is not bound to take notice."

The same rule is maintained in Rhode Island. *Whipple v. Railroad Co.*, 19 R. I. 587 (61 Am. St. Rep. 796), is substantially on all fours with the case under consideration. Speaking of the duty of the plaintiff to know of the proximity of the telegraph pole to the track as affecting the question of assumption of risk, the court say:

“ We do not think that the fact was sufficiently obvious. The difference between the distance which the pole stood from the track and the distance which would have been safe was only seven or eight inches. The plaintiff had never, before the accident, so far as appears, passed or attempted to pass the pole on the side ladder of a car. The only opportunities which he had had to judge of its proximity to the track were from passing it on foot and on the tops of moving cars in the course of his employment, neither of which situations would be favorable for estimating the distance of the pole from the side of a car moving along the track with sufficient accuracy to know whether or not the pole was safe, the margin of safety or danger being so slight a space.”

In *Johnson v. Railway Co.*, 43 Minn. 53, which was a case of a signal post, the court held that the employé was not to be held to have assumed the risk, in the absence of notice, unless it was apparent. See, also, *Atlanta, etc., R. Co. v. Woodruff*, 66 Ga. 707.

Other cases might be cited, but it is believed that these cases from Illinois, Oregon, Minnesota, Texas, Massachusetts, Iowa, Wisconsin, Kansas, Indiana, Georgia, and Rhode Island sufficiently indicate the trend of authority. In a general way it may be said that the cases which deny liability rest upon the ground that the obstruction in the particular case was not a negligent obstruction, as in *Randall v. Railroad Co.*, 109 U. S. 478, and *Illick v. Railroad Co.*, 67 Mich. 632; or that the plaintiff, having previous knowledge of the situation, assumed the risk, as in *Pennington v. Railway Co.*, 90 Mich. 505, where there was actual knowledge; or as in *Manning v. Railway Co.*, 105 Mich. 260, and in *Missouri, etc., R. Co. v. Somers*, 71 Tex. 700, where he knew of similar obstructions, and is not held excused from the duty of discovering the particular one. The correct rule is tersely stated in 3 Elliott, R. R. § 1269:

“ It seems to us that, where the employé has knowledge, or is chargeable with knowledge, of the existence and situation of such structures, he assumes the risk of dangers from them.”

To say just when the servant not having actual knowledge of the obstruction causing the injury is chargeable with such notice is not always an easy task. As we have seen, if he knows that other like obstructions exist along the way, this is notice; but, in the absence of such circumstances, we think that wrong is not to be imputed to the employé for not assuming that his employer will unnecessarily and negligently expose him to danger. We think this case was one for the jury.

It is claimed that error was committed in the admission of testimony of medical experts. Dr. Hume, Dr. Phippen, and Dr. Perkins examined the plaintiff shortly before the trial. The testimony which they gave as to the examination, and what it disclosed, was not objected to. A hypothetical question was then put, and it is contended that, by the terms of the question, the witness was at liberty to consider the subjective symptoms in giving his answer. The question did not call upon him to do so, and no such specific objection was made on the trial. We think there was no error in this ruling.

Some time after plaintiff received his injuries, and on October 31, 1892, he signed a release reciting that he had received certain injuries, as follows: "At Milwaukee Junction, while riding on a ladder of car, was knocked off by a post standing a little west of the road crossing, cutting the side of my head, and bruising my shoulder;" and, after reciting that the company denied liability, for the purpose of determining and ending the question of liability and to avoid litigation, in consideration of re-employment by the company, the release proceeds: "I do hereby waive and relinquish all claims that I may have against the said company for damages for the aforesaid injuries, and do hereby release the said company of and from all claims for damages as aforesaid." The recited consideration for this release is "the re-employment by the said company for such time only as may be satisfactory to the said company." The testimony shows that, at the time when the release was signed, the plaintiff was

already again in the defendant's employ. No change as to the terms of employment was made, nor was the defendant company bound to retain him in its employ for any length of time whatever. There was no consideration for the release. The case is, in this respect, very similar to *Purdy v. Railroad Co.*, 125 N. Y. 209 (21 Am. St. Rep. 736). It is unnecessary to review the instructions relating to this feature of the case.

A motion for a new trial was made, and error is assigned on the refusal to grant this motion. It is argued that the great weight of the testimony shows that the plaintiff rode past the post in question a great number of times. If this fact were controlling, we should be strongly inclined to accept the view of defendant's counsel that a new trial should be awarded. We do not, however, regard the fact as conclusive of defendant's claim. The inference to be drawn from the fact was for the jury.

We discover no material error. The judgment is affirmed.

MOORE, J., concurred with MONTGOMERY, J. HOOKER, J., concurred in the result.

LONG, J. (*dissenting*). The plaintiff entered the service of the defendant as a brakeman on March 22, 1892, having previously had considerable experience in that line of work on other roads. He worked upon freight trains 9 days in March and 19 days in April, and on freight and mixed trains 29 days in May, running between Detroit, Pontiac, Holly, Owosso, and other western points, including Grand Rapids. In the performance of his duties as a brakeman, he rode on the tops of box cars coming into all stations, and in going to and fro between Milwaukee Junction and the station at Detroit. He went to Pontiac in June, and while there worked on the Orchard Lake Branch. He returned to Detroit in August, and worked on passenger trains between Detroit and Grand Haven during that month, and from September 1st to September 14th. On September 15th he left Detroit for Holly on a

freight train, and returned to Detroit on the morning of the 16th, when he went in on the "East Y," so called, and assisted in picking up 23 cars. These cars were taken off the east Y at 4:50 a. m., standard time, as the record shows. On the evening of the 16th of September he left Detroit for Owosso, with a train, and returned on the evening of the 17th. This train arrived at Milwaukee Junction at about 8:30 p. m. The conductor learned that there were some cars on the east Y to be taken to Detroit, and the train pulled down to Milwaukee avenue. The engine and two cars were cut off the train, and pulled over the switch that leads off the main track to the east Y. Plaintiff turned the switch, went back on the east side of the track, 4 or 5 feet distant from the east rail, giving his signals, with his lantern, to the fireman, as the track upon which the coupling was to be made was on a curve. He continued to signal the engine back until it reached the cars that were to be picked up on this Y. The coupling was made, the conductor gave the signal to go ahead, and the engineer pulled the cars out on the main line. The plaintiff, instead of getting into the cab of the engine, or walking to the switch, climbed on the ladder on the side of the car, and, as the train pulled out over the Y, came in contact with a telegraph pole that stood on the east side of the Y track, and about 4 feet distant from the track, and sustained the injuries complained of.

This pole was in the same position as when the plaintiff entered the defendant's employ, and had been in the same place for many years. The east Y was used to store cars that came off the different roads, destined for Detroit. It had been so used for a good many years, and no one had ever come in contact with the pole before, although trainmen had often ridden by it on the sides of cars, in the night-time as well as in the daytime. The plaintiff had frequently assisted in picking up and leaving cars at Milwaukee Junction, and in so doing had passed and repassed the pole in question. He passed the telegraph pole at least 50 times on trains before his injury. He had been in

on the east Y at least 10 times before, and had assisted each time in picking up cars on the Y. It is true that he denied ever having seen the pole, or that he had ever been in on the Y before; but the defendant's witnesses, corroborated as they were by the daily records kept by the conductors and the car-checkers, and by the books of the train-master, from which the plaintiff's pay-checks were made, which plaintiff admitted to be correct, made, as they were, by different persons in different departments and for different purposes, and all agreeing, compel the conclusion that the plaintiff was on the Y as the defendant's witnesses testified, and had assisted in picking up 94 cars there before he was hurt. Thus it appears that the plaintiff had been in the defendant's service for nearly six months, and a considerable part of his time had been spent on freight trains running between Detroit, Grand Rapids, and intermediate points. The evidence shows that, in doing his work, he had stopped at all, or nearly all, of the stations along the defendant's line of road, to take on and put off cars, and that, in doing his work at the several stations, he must have become familiar with the structures, not only along the line of the main track, but on the side tracks and in the yards and stations of the line, if he was attentive to his surroundings, as it was his legal duty to be.

If the plaintiff could not, in six months, have made himself familiar with the location of structures such as awnings, freight platforms, cattle-chutes, coal-bins, side tracks, Y's, telegraph poles, and other necessary structures adjacent to the tracks and Y's at stations and in yards along the entire line of the defendant's road, such knowledge can never be presumed from lapse of time, coupled with opportunity to acquire it. The rules of the company, of which he had a copy, required him to examine all machinery, tools, cars, engines, and tracks before exposing himself to danger, and to take sufficient time to make such examination. There is no evidence in this record to show that the pole in question was nearer the track than many others, or than other structures in defendant's yards and

stations along its entire line. This casualty occurred on a side or Y track in the defendant's freight yard, and with reference to such tracks a different duty to the servant devolves upon the master than that with reference to the main track, as we have held. *Michigan Central R. Co. v. Austin*, 40 Mich. 250; *Batterson v. Railway Co.*, 53 Mich. 125; *Hewitt v. Railroad Co.*, 67 Mich. 61; *O'Donnell v. Railway Co.*, 89 Mich. 174. We think that the plaintiff's opportunities of knowledge of this pole were such that he must be held to have known of its existence and location. The decisions of courts in different States are not harmonious in applying the rule of assumed risks. Different courts have reached different results on the same state of facts. The cases in this State, however, are quite uniform, and we think that this case is clearly within the holdings of this court in *Illick v. Railroad Co.*, 67 Mich. 632; *Pennington v. Railway Co.*, 90 Mich. 505; *Ragon v. Railway Co.*, 97 Mich. 265 (37 Am. St. Rep. 336); and *Manning v. Railway Co.*, 105 Mich. 260.

In *Illick v. Railroad Co.*, *supra*, the negligence charged was that the bridge was too narrow, and that, by reason thereof, a brakeman was injured by coming in contact with the side of the bridge while in the discharge of his duty. He had passed over the bridge a good many times, but there was no evidence that he knew just what the space was between the side of the car and the bridge. Held, that he assumed the risk. *Pennington v. Railway Co.*, *supra*, was a similar case. The deceased was a brakeman engaged in switching cars, and was caught between the side of a car and a building only 13 inches distant, while descending on the side of a car. He had done work in the yard before, and in that way had become familiar with the building, but there was no evidence that he knew the exact distance between the side of the car and the building. Held, that he assumed the risk. In *Ragon v. Railway Co.*, *supra*, a brakeman was injured in making a coupling on a side track that was not properly ballasted. The plaintiff testified that he

did not know of the hole. The evidence, however, showed that he had been in the employ of the defendant for some time, and that he had passed and repassed the yard and switch in question on the main track. Held, that he assumed the risk. It is difficult to distinguish this case, in principle and in its facts, from the present case. If a brakeman is negligent in failing to see a hole in a side track, while performing work on the main track, it is difficult to see why he should not be held negligent in failing to see a telegraph pole by the side of the track, that he had passed and repassed frequently, as in this case. In *Manning v. Railway Co.*, *supra*, the negligence charged was that a tree was permitted to stand too close to the track. The brakeman who was killed commenced working upon that particular train that morning. There was no evidence that he knew, or that he had had an opportunity to learn, the exact distance between the tree and the side of the car. It was held that he assumed the risk.

The following cases, decided by the courts of other States, sustain the view here taken: In *Lovejoy v. Railroad Co.*, 125 Mass. 79 (28 Am. Rep. 206), an engineer was injured by coming in contact with a signal post at the side of the track, 3 feet and 8 inches distant therefrom, while leaning out of the engine, and looking back to get a signal from the conductor. It appeared that he knew of the signal posts along the line, but that he had not noticed the one that caused his injuries. Held, that he assumed the risk. In *Fisk v. Railroad Co.*, 158 Mass. 238, a freight brakeman was injured by coming in contact with a wooden awning projecting from a passenger station. He had worked on that line of road for two years. He was acquainted with the station, and knew that there was an awning there. On a dark and rainy night he started to go up on the side ladder of a freight car that had come from another railroad, and in passing the station struck against the awning. The car was higher than others. He had ridden on such cars before. Held, that he assumed

the risk. In *Thain v. Railroad Co.*, 161 Mass. 353, an engineer was carried against a wooden post standing 4 feet from the track and 2 feet from the tender beam, where he was at the time. The post had been there a week, and he had passed it daily, but did not know that it was there. The court said:

"It is necessary for railroad companies to put up structures near enough to their tracks for it to be possible for persons upon the trains to come in contact with them. * * * A company is not bound to give warning of every such structure to every person employed upon its trains. There must be some point within the limit which it is possible for a man on a train to reach at which the railroad company has a right to build without notice, and to assume that those on the trains will keep out of the way. Every one knows that there is danger as soon as he gets outside of the line of the train, when it is in motion."

In *Goodes v. Railroad Co.*, 162 Mass. 287, a brakeman struck against a switch-stand that was close to the track, and was knocked off the car and fatally injured, while uncoupling freight cars at night. He had been working for the defendant nearly three months, had worked as a brakeman on another railroad for several months previously, knew his business, and was competent and intelligent. He had passed over and by the switch, both by day and by night. Held, that he assumed the risk. In *Austin v. Railroad Co.*, 164 Mass. 282, a brakeman struck a gate-post near the track, and was injured. He had had occasion to go by it in the course of his employment. Held, that he assumed the risk, whether he actually knew the danger or not. In *Content v. Railroad Co.*, 165 Mass. 267, a trainman standing on the side ladder of a moving freight car came in contact with an unusually wide car that was standing on a parallel side track, and was injured. He knew that it was customary to store such cars on the side track, and the position of the tracks was visible. Held, that he assumed the risk. In *Vining v. Railroad Co.*, 167 Mass. 539, a brakeman, while ascending the side ladder of a moving freight car in the day-

time, came in contact with another car standing on an adjacent side track, and was injured. He had worked on the line for a year. He had not seen the other car, and testified that he did not think of looking. Held, that he assumed the risk. In *Bell v. Railroad Co.*, 168 Mass. 443, a brakeman came in contact with a pillar of a draw-bridge while descending the side ladder of a moving car at night, and was injured. The pillar was about 4 feet from the track. The plaintiff knew of the bridge. Held, that he assumed the risk of such dangers. In *Ryan v. Railroad Co.*, 169 Mass. 267, a brakeman, while descending from the top of a freight car, struck a picket fence on the top of a 4-foot wall alongside the track, and was injured. The fence was 3 feet 9½ inches from the nearest rail. Held, that he assumed the risk.

In *Perigo v. Railway Co.*, 52 Iowa, 276, a baggage-man, while on a moving passenger car, came in contact with a coal platform that was within 7 inches of the car at one end and within 4½ inches of it at the other. He knew of the platform. Held, that he assumed the risk. In *Brown v. Railway Co.*, 69 Iowa, 161, a fireman came in contact with a snow bank that was close to the track, while his crew were cleaning snow from the track with a snow-plow, and was killed. The court said:

“He must be held to have the same knowledge of this danger as he had of the close proximity of cattle-chutes, coal-sheds, platforms, bridges, water-pipes, or other structures and appliances necessarily located in close proximity to the track, which may be passed in perfect safety so long as employes keep themselves within line of the cars in the train, but which are dangerous when an employé exposes himself to contact with them by swinging outside of the line of the train.”

In *McKee v. Railway Co.*, 83 Iowa, 616, an experienced brakeman climbed down the side ladder of a moving freight car, and hung down, and looked under the car, in the performance of his duty. His head struck a wing fence, and he was killed. The fence was 3 feet and 10

inches from the rail, and was at about the same distance from the rail as other wing fences on the line. Held, that he assumed the risk.

In *Gibson v. Railway Co.*, 63 N. Y. 452 (20 Am. Rep. 552), a conductor came in contact with the projecting roof of a depot building, and was injured. The court say :

“When the deceased entered the employment of the defendant, he assumed the usual risks and perils of the service, and also the risks and perils incident to the use of the machinery and property of the defendant, as it then was, so far as such risks were apparent. * * * He could not call upon the defendant to make alterations to secure greater safety, nor, in case of injury from risks which were apparent, could he call upon his employer for indemnity.”

In *De Forest v. Jewett*, 88 N. Y. 264, a yardman fell into a small sluice or ditch in the railroad yard, and was injured. He had been employed in the yard for about two years, and knew of the existence of sluices and ditches in it; and, so far as could be determined by seeing them daily, he knew their width and depth, and the manner of their construction. Held, that he assumed the risk. In *Tuttle v. Railway Co.*, 122 U. S. 189, a brakeman was caught between cars by the drawbars' passing each other while attempting to couple cars on a curved track, and was killed. The alleged cause of the accident was the sharpness of the curve. Held that, as the perils were seen and known, he assumed the risk. In *Randall v. Railroad Co.*, 109 U. S. 478, a brakeman, while working a ground switch for his train on one track, was struck by an engine passing on an adjacent parallel track, and injured. Held, that he assumed the risk of the switchstand being too near the adjacent track, and that “a railroad yard where trains are made up necessarily has a great number of tracks and switches close to one another, and any one who enters the service of a railroad corporation in any work connected with the making up or moving of trains assumes the risks of that condition of things.”

In *Williams v. Railroad Co.*, 116 N. Y. 628, a freight brakeman, while standing on the top of a box car passing under a bridge, came in contact with the bridge, and was injured. He had passed under the bridge on trains daily for three weeks. Held, that he must have known that it was not of sufficient height to permit him to stand while so passing, and that he assumed the risk.

In *Pennsylvania Co. v. Finney*, 145 Ind. 551, a brakeman of six months' experience, while descending the side ladder of a car, came against a water-plug located so near the track that a person in the position he was in could not avoid it, and was killed. He had passed it almost daily during his employment. Held, that—

“It was his duty to observe his surroundings before attempting to go down the ladder, and, had he exercised ordinary care and prudence in this respect, * * * the accident would not have occurred. * * * The means which a person has of knowing that, under the circumstances, he will expose himself to peril, are deemed in law to be evidence of knowledge of that fact.”

In *Ryan v. Railway Co.*, 10 Ont. 745, a brakeman of several months' service, while holding on to the side ladder of a moving car, came in contact with a switch target, and was thrown under the train and killed. The switch-stand had been erected in the yard before he commenced his service, so that he was aware of its proximity to the track. Held, that he assumed the risk.

In *Missouri, etc., R. Co. v. Somers*, 71 Tex. 700, a brakeman, while stepping down upon the rear platform of a caboose, in order to release the brakes on it, struck against a cattle-guard fence, and was injured. The plaintiff testified that he knew that several of the cattle-guards on the railroad were sufficiently near the track to strike the feet of a brakeman sitting upon the top of a car with his legs hanging down, but that he knew nothing of the one which caused the injury, except that it could not have been more than 10 inches from the car in order to strike him. Held, that he assumed the risk.

In *Scidmore v. Railway Co.*, 89 Wis. 188, a brakeman, in alighting from his train in the night-time, in the performance of his duties, struck against a "clearance" post, and was thrown under the wheels of a moving car and injured. Held, that the knowledge of the brakeman that posts were used along the line of the road imposed upon him the risk incident to the existence of the particular post in question, although he had no actual knowledge of its existence.

In *Boyd v. Harris*, 176 Pa. St. 484, a brakeman, while performing his duties on a train, came in contact with a cattle-chute on a siding close to the rail, and was killed. He had passed it daily for two months. Held, that he assumed the risk; that—

"The duty to observe and make himself acquainted with the obvious dangers to which his employment exposed him was on the deceased. The opportunity to observe and acquire a knowledge of these dangers had been enjoyed by him for many days. Under such circumstances, the fair legal presumption is that he had improved the opportunity to observe and discharge the duty towards himself and his employer which his service required of him. If this proposition be denied, then for how many more months must an employé pass a point of danger daily before the presumption will arise? Will it ever arise? Or must the question of actual knowledge be turned over to the jury to guess at in all such cases?"

There are cases cited from courts of other States which it may be said do not approve of the position taken by the courts in the foregoing cases. It will, however, be seen by an examination of the facts in each case, that the courts have refused to apply the rule of assumed risk because the servant did not know the exact danger, or had not had sufficient opportunity to learn of it. In *Scanlon v. Railroad Co.*, 147 Mass. 484 (9 Am. St. Rep. 732), the facts were that the distance between a signal post by the side of a railroad and a ladder on the outside of a car was one foot. A brakeman, on his first trip, did not know that there were erections so near, and was not informed

of the danger. They were, in fact, exceptional. It was held that the danger was not obviously incident to his employment; therefore the risk could not be said, as a matter of law, to have been assumed. In *Illinois Central R. Co. v. Welch*, 52 Ill. 183 (4 Am. Rep. 593), a brakeman was injured by coming in contact with an awning projecting over the track. The company was held to be negligent in this respect, and the court say that there was no reason for supposing that the plaintiff had acquired knowledge of the unsafe condition of this awning before he was injured, as he had only been two months upon the road, and, except upon two trips, had always passed this station in the night. *Chicago, etc., R. Co. v. Russell*, 91 Ill. 298 (33 Am. Rep. 54), is to the effect that leaving for months a telegraph pole near the track is negligence. Yet the court say in that case that there was no evidence that the deceased knew anything of this pole, or that he was ever required before to assist in switching cars off from this track. In *Boss v. Railroad Co.*, 2 N. Dak. 128 (33 Am. St. Rep. 756), the plaintiff had passed the switch-stand on this train nearly every day for two weeks, but he had no duty to perform in connection with the running of the train. The court say :

“ Had he known of its existence, or had he been chargeable with such knowledge, perhaps it would have been negligence on his part not to have watched for and guarded against it.”

In *Walsh v. Navigation Co.*, 10 Or. 250, a brakeman put his head 8 inches out of a car window, in the night-time, to see what was the cause of a certain noise in the running of his train, and his head came in contact with the timbers of a water-tank that was from 6 to 18 inches from the window sills of the car. The gauge of the railway had been recently widened, so as to bring the cars nearer to the timbers. The plaintiff had no knowledge of the proximity of the tank to the window, occasioned by the widening of the gauge. Held, that he did not assume the risk, as a matter of law. In *Johnston v. Railway Co.*,

23 Or. 94, a switchman had been employed in the yard only about two weeks. Held, that it could not be said, as a matter of law, that he was negligent. The court say: "While he must have known of the existence and location of this switch target, he may not have known from observation * * * that it was near enough to the cars to be dangerous."

In *St. Louis, etc., R. Co. v. Irwin*, 37 Kan. 701 (1 Am. St. Rep. 266), a freight-train conductor, while riding on top of his caboose, struck a brace that extended from the side-post to the top-beam of a bridge, and was injured. He had run over the road and through the bridge daily for three months preceding the accident, and knew that the bridge was constructed with overhead timbers. It did not appear that he had been on top of the cars more than once, in passing over the bridge, before the time of the accident. It was found by the jury that he had no knowledge or opportunity to know of the dangerous character of the bridge. Held, that whether he was negligent was for the jury.

In *Kelleher v. Railroad Co.*, 80 Wis. 584, a switchman struck against a coal-shed standing near the side track, and was injured. It did not positively appear that he ever had made this switch before. If he had ever done it at all, it was but a few times. The jury found that the shed was so close as to be unnecessarily dangerous, that deceased did not know of the existence of the shed at its distance from the track and cars, and that he had not the means of such knowledge. Held, that he did not assume the risk. In *Dorsey v. Construction Co.*, 42 Wis. 583, the rule was stated that the knowledge on the part of the servant should be of the precise danger to him from an obvious defect, in order to hold him to an assumption of the risk. The facts in that case were that the conductor of a freight train was injured, while climbing up the ladder of a freight car, by coming in contact with a cattle-chute erected near the track,—dangerously near, as the court say. The proof showed that he had

been employed for some months upon that part of the road; passed the chute during the term of his employment almost daily; knew the cattle-chute was there; and knew the exact location, with reference to the track, of two other chutes, similarly located, at adjacent stations. Yet the court stated that, while he may have known generally of the proximity of the chute in question to the track, it did not necessarily follow that he knew its precise distance therefrom, and consequently the precise danger.

In *Johnson v. Railway Co.*, 43 Minn. 53, the injury to the servant was caused by his coming in contact with a signal post erected in defendant's yard, and situate about 4 feet from the track. At the time he received the injury, he was climbing up the ladder of a box car. He had been employed as switchman in the yard for two weeks or more, passing this post many times each day. The court say:

"We are not prepared to say * * * that he knew, or should have known, if he used ordinary prudence, the danger of such an accident. * * * While he must have known of the existence and location of this post, he may not have known from mere observation, or unless his attention had in some way been specially called to it (situated, as it was, in the center, between the tracks), that it was near enough to the cars to be dangerous, but might be misled, unless he had made actual measurement or calculation."

In *Sweet v. Railroad Co.*, 87 Mich. 559, the injured servant was one of a crew of switchmen in the company's yard at Detroit, and his duties extended to all parts of the yard. His injuries were caused by coming in contact with a large shed of the defendant, located in the yard, near the side track, while he was ascending or descending a ladder upon one of defendant's cars which was being moved on such track. The shed had been there for five years; and the intestate, who had formerly been a brakeman, had been employed as a switchman in that yard for a month or six weeks. There was no direct evidence that he was ever on that siding before the accident, or that his

attention had been called to the dangerous proximity of the building, but there was evidence that cars were probably shipped in there once or twice a day.

In analyzing and discussing these cases, Bailey (Mast. Liab. p. 174) says:

"This case [*Sweet v. Railroad Co.*, *supra*] was decided upon the somewhat peculiar ground that it was not his duty to inform himself of the danger to be apprehended from the defect until he had some reason to apprehend danger from it; that until then he might be influenced by the assumption that the master had regard for his duty, and would not negligently expose him to extraordinary peril.

"Was the rule applied in either of the foregoing cases? Rather, was it not evaded, or, more correctly speaking, was it not misapplied? Did not the injured employé in each of them have an abundant opportunity to ascertain the exact location of the structures with which he came in contact? It required no special skill or training to foresee that they were likely to occasion him harm. It was a part of the duty of the servants thus engaged to obtain a knowledge of such risks and dangers. We have seen, *ante*, that he must take ordinary care to learn the dangers which are likely to beset him in the service; that he must not go blindly at his work, when there is danger; that he must inform himself; that such is the law everywhere; that he must use reasonable care in examining his surroundings; that knowledge on his part will be presumed, if the defect is obvious.

"It cannot be questioned for a moment that these cases were not decided in accordance with the rule stated, but rather from a special rule, arbitrarily applied by the court, and so applied by ignoring the contract relations between the parties, and ignoring the rights of the master as a party to that contract. We have seen that the duty of the master in such case is not to see that the servant actually knows. He has a right to rest upon the probability that anybody would know what was generally to be seen by his own observation. And to assume for a moment that a switchman, employed in a yard for weeks, did not know the location of a building or of a post in plain sight, and which he passed many times a day; that he did not know its danger, simply because he may not have meas-

ured its distance from a track, when the only reasonable presumption is that he did not look at the time, or failed to remember,—is to disregard every reasonable inference. The master had a right to expect, when he placed so conspicuous an object before his servants, that they would observe it; would learn—would know—its precise danger to them. And, if he had such right to so assume, he could not be held to the duty of specially informing each employé that he had 100 or more signal posts, 100 or more cattle-chutes, 100 or more buildings of different sizes and of variable distances from his tracks (either main or side tracks), and specify to each such employé the exact distance in feet or inches each one was from the track. Such warning would be useless. No employé would pretend to remember the information as to each. His observation is a more perfect, safe, and certain means of information, and his own sense of duty and danger more suggestive of observation, than all the verbal or printed information the master could give.”

Again, on page 180, he says:

“The contract, therefore, must be that risks and perils obvious to a person of ordinary understanding are embraced therein, and assumed by the servant, when the opportunity has existed for observation. Where there are no peculiar dangers, knowledge of the defect is knowledge of the danger. The danger of contact with a post or structure while on a moving train is a matter of common knowledge. As to such defects, the servant cannot be heard to say that, while they were apparent and obvious, yet he did not know or ascertain their precise location, or realize their apparent danger. Knowing them to exist, it is his duty to ascertain their precise location with reference to the performance of his duties. When the location is ascertained, the danger is manifest; it being the law and the contract that the servant ought to know that which was plain to be seen, and which it was a part of his duty to learn and know. How, then, can it be said that the jury are to determine whether or not he had knowledge?”

In this view of the law we fully concur.

In *Whipple v. Railroad Co.*, 19 R. I. 587 (61 Am. St. Rep. 796), a brakeman was knocked from a freight car, and injured, while climbing a ladder on its side, by strik-

ing a telegraph pole that stood about $3\frac{1}{2}$ feet from the rail of the side track, but inclined somewhat towards the track, the space between the pole and the top of the car being about 15 inches, which was sufficient to permit the passage of a man if standing erect, but insufficient by 7 or 8 inches to allow of his passage while climbing a ladder. He had worked in the freight yard in making up freight trains for two or three months previously, and seems to have frequently passed the pole on foot, and on the tops of the moving cars, but had never attempted to pass it on the side ladder of a moving car. Held, that the danger was not so obvious as to charge plaintiff with knowledge of it. This, and like cases that may be found in the reports, we think, cannot be sustained upon principle, and leave anything of the rule of assumed risks.

There are many other errors assigned in the record, but we do not deem it necessary to consider them, as, in the view we take, they are immaterial.

The judgment should be set aside, and no new trial awarded.

GRANT, C. J., concurred with LONG, J.

ON REHEARING.

PER CURIAM. A majority of the court are of the opinion that the judgment in this cause should be reversed upon the ground of intemperate and improper language by counsel in the argument, and a failure on the part of the trial court to appreciate and perform his responsibilities and duties in the conduct of the trial.

The judgment is reversed, and a new trial ordered.

DAVEY v. HALL & MUNSON CO.

INJURY TO EMPLOYÉ—ASSUMPTION OF RISK.

The ends of the cross-planking of a tramway, on which plaintiff was employed as a driver, extended beyond the stringers from 8 to 14 inches. Many of them became broken, being of a poor quality of pine, and when so broken were never repaired. There was barely room for a person to stand upon them when a loaded car was on the track. The space between the rails was doubly planked, and was maintained in a safe condition. Plaintiff, while lifting a derailed car, threw his weight on the end of one of the planks, and it broke and caused his injury. He had had five years' experience about the tramway, and knew that the car could be replaced without his standing outside the stringer. *Held*, that he assumed the risk. MONTGOMERY and MOORE, JJ., dissenting.

Error to Chippewa; Steere, J. Submitted April 5, 1899. Decided December 12, 1899.

Case by James Davey against the Hall & Munson Company for personal injuries. From a judgment for defendant on verdict directed by the court, plaintiff brings error. Affirmed.

Warner & Sullivan, for appellant.

E. S. B. Sutton (*John W. Shine*, of counsel), for appellee.

MONTGOMERY, J. (*dissenting*). This is an action for personal injuries received by the plaintiff through the alleged negligence of defendant in failing to provide a safe place for plaintiff to work in, and to properly construct, inspect, renew, and repair a certain tramway upon which plaintiff was employed as driver, and a fall from which caused the injury. Defendant is the owner of a large lumber-manufacturing plant at Bay Mills, in Chippewa county, composed of sawmills, factories, lumber

yards and docks, and about three miles of elevated tramways. The tramways are about 12 or 15 feet above the ground, and constructed in bents built of 8x8 timbers, with two posts or uprights, a sill on the bottom, and a cap or crosspiece on the top. These bents are 16 feet apart, and support 4x10-inch stringers, placed on their edges. On the stringers, crosswise of the tramway, are the pine cross-planks, which are nailed to the stringers. On the cross-planking, and directly over the stringer, is a bedplate or plank, 2x10 inches, laid flat, upon which the iron rails rest which carry the tram-cars. The particular tram in question in this case, known as the "Grand-Stand Tram," was built six years prior to the injury of plaintiff; and planks taken from another tram, known as the "Canadian Tram," where they had already been in use a number of years, were used for the cross-planking. These planks were not sound when put in the Grand-Stand tram, and the attention of the foreman was called to that fact. This cross-planking all along the tramway extends out beyond the stringer and bedplate from 10 to 14 inches; the ends being without support underneath or covering on top. It is claimed by defendant that these ends were not a necessary part of the tramway, which it was its duty to keep in repair; while plaintiff claims they were an essential part of the tramway, upon which it was frequently necessary for himself and other employés to walk or stand. The cross-planking between the rails was covered with boards called "sheathing," laid lengthwise of the tram and crosswise of the planking, upon which the horse walked when drawing the cars; so that the only parts of the cross-planking which could be seen by the driver, when on the tram, were the ends which extended outside the bedpiece. Underneath the bedpiece, and between that and the stringer, this cross-planking had become decayed, —so much so that in places, where it became necessary to replace a broken bedpiece, the cross-planking would not hold the spikes; and the attention of the superintendent and foreman had been called to that fact. At frequent

intervals along the whole tramway, ends of cross-planking had been broken off by lumber falling upon them, by cars running off the track, and in various ways; but the ends of the planking, so far as could be seen without taking up the bedpiece, appeared sound, according to the weight of evidence, including the testimony of the defendant's foreman, McKean.

It was a frequent occurrence that tram-cars were derailed, and it then became the duty of the tram driver to call assistance, and get the car back on the rails. At the time of the injury, a car had become derailed, and plaintiff called assistance to get it back on the track. There is a dispute in the testimony both as to the usual method of putting derailed cars on the track, and as to the method employed by plaintiff; plaintiff claiming that he went about it in the usual way, which was the quickest way, and defendant claiming that the method employed was unusual and more dangerous. Plaintiff testified that, in case of a heavy load, it was usual and necessary to use a pry, and stand in the center of the track, but in the case of a small load it was not necessary. According to the plaintiff's testimony, he had taken a short piece of 2x4 to use as a lever, and had stepped one foot outside the rail onto the projecting end of the cross-planking, and was standing in that position, one foot outside and one foot inside the rail, with the end of the 2x4 inside the rail for a purchase, and pressing against the forward wheel of the car to swing it on the track as the other men lifted up the end of the car; and as they lifted, and he put his weight on the foot outside the rail, in using the 2x4, the end of the plank broke short off between the bedpiece and the stringer, where it had become decayed, letting plaintiff fall to the ground below, breaking his leg and injuring his back. It is claimed on the part of the defendant that plaintiff stood at the side of the car, between the two wheels, facing directly against the side of the car, and attempted to pry the car on with a lever, standing on the end of the cross-planking. The plaintiff also testified that he stepped onto the end of

the plank without making any examination to see if it was sound, and that the defect from which it broke was rot underneath the stringer.

The circuit judge directed a verdict for defendant on the ground of plaintiff's alleged contributory negligence—*First*, in adopting the more dangerous of the two methods in putting the car on the track; and, *second*, because "he took no pains to look to see whether this plank was weak or strong; that he did not observe to see whether it was rotten or sound." The defendant also contends in this court that the ends of the plank were not a place to work provided by defendant.

The court below treated the case as a proper one for the application of the rule that where one has the opportunity of choosing between two methods of doing work, and chooses to adopt one which is obviously dangerous, the master is not responsible for the risk assumed. It seems to us that whether this case is a proper one for the application of this rule must depend upon whether, as matter of law, we are able to say that the ends of these planks were not intended for or adapted to the use to which they were put; in other words, whether the ends were a part of the tramway which the employes had a right to occupy in the performance of this duty. We are not prepared to say, as matter of law, that they might not have been so used with entire propriety. It is true, there was a method of lifting these cars onto the track without stepping onto the plank, but it appears it was not the only method. It might not have been the only safe method if the plank had been sound.

The plaintiff testified that he took no notice of the plank, as to whether it was sound or weak; that he was intent on getting the car on the track; that he saw there was a plank there to put his foot on. It is claimed this was contributory negligence. We would have no hesitancy in holding that it was, if it appeared conclusively that an inspection of the plank would have disclosed its weakness; but the testimony on this point was contradictory.

The question should, therefore, have been submitted to the jury.

MOORE, J., concurred with MONTGOMERY, J.

GRANT, C. J. The following facts are established by the evidence: These tramways were constructed in the usual manner and of the usual material. They are not constructed of the best and sound lumber, but of culled and knotty white pine. The ends of the planks are not supported, and extend from 8 or 10 to 14 inches outside the stringer. The plank between the rails is covered with inch boards, to make it safe for the horses and men in charge to walk on. Cars derailed frequently cut, indent, and break the ends of the plank. Many of the ends of the tramway where the plaintiff was hurt were thus broken. They were never repaired. In fact, the only way they could be repaired would be to raise the rail, remove the planks, and insert new ones. It was the duty of plaintiff and others to report any defects in the tramway to the tramway repairers provided by defendant. Defects in the ends of these planks were never reported, although they were known both to plaintiff and others. Pries were furnished for the purpose of raising the derailed cars and putting them upon the track. It was dangerous to walk upon these ends, and still more dangerous to stand upon them and lift, or to use them as a fulcrum to raise the cars. Mr. Hawes, the only witness for plaintiff besides himself, testified that it was dangerous and risky to get out upon them, even to walk. These single tramways were designed only for the use of the employés in charge of the horses and cars. They were not designed as passageways for other employés. The "bunks," as they are called, extend 6 to 8 inches over the sides of the cars, leaving barely room, as plaintiff testified, for a man to stand upon the end of the plank, with a loaded car upon the track. The danger in attempting to do so while a car is passing is apparent. The distance from the sides of the car to the ends of the planks did not exceed 4 to 8 inches. It is not possible that these spaces were intended for travel. Plain-

tiff had been at work in these yards and tramways for five years, and was perfectly familiar with their condition, but made no protest, and never even suggested that the ends of the plank needed repairing. He stood upon this plank, and lifted, as he testified, with one foot outside the stringer and one in, or as another witness, who stood near him, testified, with both feet upon the end of the plank, without any examination or sounding of the plank. He testified that he took no notice of the plank at all, and stepped on it regardless of whether it was solid or weak. Under these circumstances, I think the instruction of the court was correct. I see no reason or justice in permitting a recovery. It would be dangerous to use the ends of even new pine plank as a fulcrum for lifting in the way the plaintiff did. It is probable that, had he sounded the plank with his lever, it would have disclosed the defect, if any there was. The pressure upon the plank must have been great, in the attempt to lift or push the car with the lumber upon it. No claim is made that the space between the rails was not in safe condition. The defendant furnished the means and a perfectly safe place and a safe way to lift these derailed cars upon the track. If plaintiff chose to use an unsafe one, he did so at his own risk. *Goff v. Railway Co.*, 86 Wis. 237; *Richmond, etc., R. Co. v. Bivins*, 103 Ala. 142; *Romona Stone Co. v. Phillips*, 11 Ind. App. 118; *Erskine v. Beet-Sugar Co.*, 71 Fed. 270; *Gowen v. Harley*, 6 C. C. A. 190, 56 Fed. 973; *Shackelton v. Railroad Co.*, 107 Mich. 16; *Perlick v. Wooden-Ware Co.*, 119 Mich. 331. There is no evidence of any express or implied instruction or direction to plaintiff or other employes to adopt the means which plaintiff did to replace these derailed cars. Even if other employes had adopted such methods, it would not bind the defendant, and compel it to respond in damages. *Goff v. Railway Co.*, *supra*.

I think the judgment should be affirmed. It is so ordered.

HOOVER and LONG, JJ., concurred with GRANT, C. J.

SEYMOUR v. CANFIELD.

REAL-ESTATE BROKER—CONTRACT—EVIDENCE.

Evidence reviewed, and *held* not to establish an alleged agreement by defendant to purchase, through complainant, certain timber lands on which complainant claimed to have an option.

Appeal from Manistee; McMahon, J. Submitted October 4, 1899. Decided December 12, 1899.

Bill by Richard A. Seymour against John Canfield for an accounting. From a decree dismissing the bill, complainant appeals. Affirmed.

Judkins & Perkins (Crane, Norris & Stevens and George L. Hilliker, of counsel), for complainant.

Hanchett & Hanchett (Fitz Gerald & Barry, of counsel), for defendant.

HOOKER, J. The bill of complaint in this cause is filed for an accounting, and claims a large sum to be due to the complainant. The dispute arises over a sale of lands, for convenience called the "Long Lake Group," which, at the time negotiations commenced, belonged to Hannah, Lay & Co., of Traverse City. Torrent, of Muskegon, had some sort of a verbal order or option upon them. Lunney, who was in the employ of Torrent, is alleged to have obtained from Torrent a written refusal of the property for the period of 10 days, and to have arranged with Richard Seymour to aid him in finding a purchaser for it, commissions to be divided equally between them. Seymour had negotiations with the defendant, Canfield,—both being residents of Manistee,—and the latter sent estimators upon the land. Seymour claims that subsequently an agreement was made that Canfield should buy

the timber and pay \$400,000 for it, and that Seymour should care for the property until sold, and have half the profits, after paying Canfield 6 per cent. interest upon the investment and other funds advanced. Later, Canfield refused to purchase the land, and within a few days it was bought by Filer, a fellow townsman and friend of Canfield; title being taken in the name of Filer. It was kept for several years, and ultimately sold for \$850,000. The complainant now claims a share of the profits. This is an outline, merely, of the case from the complainant's standpoint, and allusion to the testimony tending to establish or dispute the claim is purposely omitted in the statement. The circuit judge filed a lengthy opinion, which gives the case in detail, and discusses the evidence at length. Upon most of the disputed questions of fact he finds with the complainant, but dismisses the bill. The record contains 1,075 pages; and the briefs, 552 pages. Upon some points the evidence is circumstantial, and the briefs necessarily contain a much fuller discussion of the questions involved, and the reasons which should lead to the one or the other conclusion, than we can be expected to incorporate in any opinion we may write; and we shall have to omit the discussion of many circumstances that counsel attach much importance to, with the simple statement that we have attempted to give each of them the full weight to which it is entitled. At the same time, we will, in a general way, give our reasons for our conclusions, though, being mainly a question of fact, a very brief opinion would ordinarily suffice.

The important questions appear to be the following, viz. :

1. What were the dates, duration, and character of the alleged option given by Torrent, and its renewals?
2. What contract was first made with Canfield, and how should it be construed?
3. Was a second contract made between Seymour and Canfield, and, if so, what were its terms, and how should they be construed?
4. Did Canfield wrongfully refuse to perform this alleged second contract?

5. Did he fraudulently procure the timber, or any part of it, through Filer?

6. If so, has the complainant a right to share the profits, if any were made by Canfield?

We will not take these up in their numerical or chronological order, but will examine first the arrangement made when Canfield's attention was called to the matter. This appears to have been done by one O'Brien, an impecunious man, whose only connection with the transaction arose from a conversation which he overheard between the complainant and his brother John in relation to some land which they hoped to get an option upon, and which bore over 100,000,000 feet of pine. Next day he saw complainant, and told him that he had a party who had plenty of money, and who would buy a large group of timber. He asked where this group was, but Seymour refused to tell him, and said he was going to have a refusal of this group, and did not want to say anything about it until it was secured. According to O'Brien's testimony, he saw Seymour again, and obtained his consent that he might speak to Canfield about it, which he did, and Canfield asked him to bring Dick Seymour down there. O'Brien and Seymour agree that, after obtaining an option, they went to see Canfield. There is nothing in Seymour's testimony that tends to show that Canfield did more than to say that he would be to the expense of sending an estimator to the land if he could be assured that he could purchase the land if found satisfactory to him. Seymour himself said that he took the refusal to Canfield, together with an estimate made for Torrent, which was shown to have been 116,000,000, and told him that Hannah, Lay & Co. had it estimated at 112,000,000, and that he had estimated it himself, and made more. He afterwards stated that he made it between 119,000,000 and 120,000,000 feet. There is testimony in the case that he said he made it 130,000,000. He testified further that Canfield said that the time was too short to look over this, and he told Canfield that he thought it unnecessary for him to go all over the

land, and that he had made an estimate of the land, and knew the timber was there. He further testified:

"Canfield said, 'Can't you get that extended?' and I said, 'I will try to get it extended.' Then he asked me what I wanted to get out of this, and I told him I wanted 10 cents a thousand, by the estimate he was having copied; and he said, 'Jim O'Brien, what do you want?' and Jim O'Brien said, 'I want \$5,000.'

"Q. What, if anything, was said at that time about other purchasers of the land?

"A. Mr. Canfield asked me if I had sought any others, or was going to seek any others. I said: 'No; if you will send your men right there to look this up, I will trust to your buying it.' He said, 'My man is here, and I will send him in the morning.' * * *

"Q. What did Mr. Canfield say with reference to his buying the land?

"*Mr. Fitz Gerald:* I object to it as leading.

"A. Mr. Canfield said he was in the market for pine, and he had the money to buy it and pay for it, if it was a good thing. He also told me: 'Now,' he says, 'I don't want to send my man there unless you will keep away from going anywhere else.' He said, 'I don't want to be put to any expense.' I said: 'All right. If you want to buy this, you can have the first chance at it. Now, send your man.' He said he would send him in the morning, and I know he did send him."

This is the substance of the testimony on behalf of the complainant in relation to this interview, except that the price asked was \$400,000, as it was said to have been fixed by the refusal. We think that it shows that Canfield consented to send an estimator, on condition that he could have an assurance that he could buy the timber in case he should want to do so after getting his estimate, and there is nothing to show that he promised to take the land unless he should choose to do so.

The next important question relates to the alleged second contract. The witnesses who testify to this are the two Seymours and Goldsborough. If we take their testimony to be true, we are still unable to find an unconditional agreement to purchase this timber for \$400,000,

in the face of Canfield's explicit denial, and other circumstances which show the improbability of the testimony. In the first place, the cross-examination of Goldsborough is such as to discredit him, while ten or a dozen witnesses were produced who unqualifiedly testified that the reputation of the Seymours for truth and veracity was bad. About as many were called by the complainant, who testified that the reputations of these men were good. It cannot, therefore, be said that they stand impeached, but they are in a measure discredited by the fact that a number of apparently respectable persons were found who would testify to their bad reputations. There are, however, some circumstances which have an important bearing. It will be remembered that Canfield insisted upon having an estimate made before he would purchase, notwithstanding the fact that Seymour wanted him to act on information imparted by him. It is clear that the estimators did not start until the 29th or 30th of September, while this alleged agreement is said to have been made on the 8th of October. The estimators returned about the 12th or 13th. Hence, while Canfield may have had some reports from them, they were not complete. Again, it is a significant fact that the contract was not closed up, which there was no occasion for postponing, if, as counsel for the complainant contend, it was not conditioned on finding the quality and quantity of timber as represented. If, in the first talk, there was any promise to buy at all, it was clearly conditioned upon the amount of timber that should be found by Canfield's estimator, and no adequate reason is shown for believing that Canfield changed his mind or made a different promise before getting the estimate. Again, Seymour's next interview does not indicate that he was then claiming that Canfield had made an unconditional agreement to purchase. He claims to have asked Canfield if he had heard from his inspectors; and again, after the inspectors had returned, and he had been told by Canfield that the inspection did not turn out as well as expected, he replied, "This is the last day of the

option." He then asked Canfield, "What have you made up your mind to do about it?" He testified further:

"I asked him if he was ready to purchase it, and had made up his mind. He said, 'No.' I told him it was kind of bad for me, waiting with the expectation of his purchasing the timber, and not seeing anybody else. It left me unable to do anything. He then said he would make me an offer of \$325,000 spot cash. I wired that offer in."

The same day Seymour showed him a telegram refusing this offer, and stating that an offer of \$400,000 had been made by others. Some days afterwards he and O'Brien went to see Canfield, and O'Brien claimed that Canfield had bought it, and demanded his commission. If it is true that Seymour and Canfield made the contract relied upon, it would seem natural that Seymour should have said something about it at these several interviews, and that he, as well as O'Brien, should have claimed commission.

In any view of the case that we can take, the testimony of these witnesses fails to show the alleged unconditional agreement. It indicates merely that a change of consideration was agreed upon, leaving Canfield under no greater obligation than to take the timber if found equal to the representations as to quantity and quality. Another convincing circumstance is that, to sustain the complainant's claim, it is necessary to find that Canfield was willing to invest the same amount of money, to get half of the prospective profits, as the whole. His risk was substantially the same, because he was not entitled to reimbursement in case of loss. We are asked to believe that the motive was to save paying commissions amounting to \$11,000 or \$12,000. This is a most improbable proposition to come from a man of Canfield's alleged sagacity. These and other circumstances not only lead us to conclude that the alleged contract is not supported by a preponderance of proof, but beget a profound conviction that no such contract was made. As this is sufficient to dispose of the

case, we might omit further discussion, but we will allude to one or two other matters.

We do not agree with the learned circuit judge that a written refusal at a price of \$400,000 was ever in Seymour's possession. Like many other important papers, it is said to have been lost; and there is no satisfactory evidence that Seymour ever sought to preserve it, although it is claimed to have been in Lunney's safe for a long time after it became apparent that it was an important paper. The existence of this paper is said to be proved by Lunney, the two Seymours, O'Brien, and Ellis. The circuit judge held explicitly that Lunney was unworthy of belief, and we are not satisfied that he was wrong about it. O'Brien did not read it; he only saw it, and heard Seymour read it. Ellis says that a paper was brought to him to examine, and, while he is not able to be very definite, he thinks it was a paper signed by Torrent, giving a right to buy timber for a large price,—\$300,000 or \$400,000, probably the latter,—upon the "Long Lake Group," so called. He says it was signed by Torrent and Lunney, which nobody else claims. On the other hand, Torrent says he gave no written refusal, and that he did not offer the lands for less than \$4 per 1,000 feet stumpage to any one until he sold to Filer. Lunney testified in a former suit against Petrie, where he sought to recover somewhere from \$6,000 to \$12,000 as commissions for bringing about the sale to Filer, in which he admits that Seymour had a half interest, that the option was verbal. Haines, a partner of Torrent, of whom Seymour made some inquiries in relation to the matter, testified that Seymour said the price was \$4 per 1,000 feet, and made no claim that Torrent offered it for \$400,000; while Canfield says he was asked \$4 per 1,000 feet, and that their negotiations were upon that basis.

If we were to say that Canfield was under obligations to take the timber in case his estimate should show the existence of 112,000,000, 116,000,000, 119,000,000, or 130,000,000 feet, we would have to say that an estimate show-

ing 103,000,000 feet would not require him to do so, and he would not be precluded from buying upon other terms from other parties. It is said that, under the original bargain, he would have paid about \$410,000 for the timber. Conceding that Filer bought it for him at his request, the amount paid was \$10,000 less than Seymour would sell it to him for, and he had a legal right to buy it. But he did not buy it. Filer had at least a half interest at all times, and if Canfield interested Filer, and was willing to take one-half at \$200,000, instead of the whole at \$410,000, it was nothing more than he had a lawful right to do. We need not, therefore, concern ourselves with the alleged concealment of Canfield's true relations to the property or to Filer.

The decree of the circuit court is affirmed, with costs.

The other Justices concurred.

STANTON v. FOSTER.

ESTATES OF DECEDENTS — WIDOW'S ALLOWANCE — RESIDUE — ASSIGNMENT BY PROBATE COURT.

Under 3 Comp. Laws 1897, § 9322, subd. 4, providing that, if the inventory of an intestate estate shows that it does not exceed in value \$150 over and above the allowances to the widow, the probate court may, by a decree for that purpose, assign the entire estate for her use and support, she acquires no property rights in such residue until the proper order is made by the probate court. LONG, J., dissenting.

Error to Sanilac; Beach, J. Submitted October 4, 1899. Decided December 12, 1899.

Replevin by Thomas J. Stanton, executor of the last will and testament of Keziah J. Johnson, deceased, against Josiah H. Foster. From a judgment for plaintiff, defendant brings error. Reversed.

C. F. Gates, for appellant.

H. O. Babcock and *E. C. Babcock*, for appellee.

HOOKEE, J. Robert H. Foster died November 24, 1894. Keziah J. Johnson, who lived and cohabited with him for many years, died September 29, 1896, leaving a will appointing the plaintiff executor, and he received letters testamentary on November 5, 1896. He took possession of the property in dispute (some horses and harrows) at once. They had been in testatrix's possession after the death of Robert H. Foster. On March 1, 1897, the defendant was appointed administrator of Robert H. Foster. Soon afterwards he replevied the property from one Freeman Johnson, the hired man of the plaintiff, who had it in his custody. The record does not show what disposition was made of that case, but subsequently this action of replevin was commenced. In his opening, counsel for the plaintiff stated that the defendant's father, Robert H. Foster, lived in Lamotte township, and Mrs. Johnson lived with him; that the harrows were purchased directly by her; that defendant's father made the bargain for the horses, but, before it was completed, Mrs. Johnson signed the note given for them, and afterwards paid it; that, after Foster died, the horses were in her possession until her death, and no one disputed her right to them or made any claim to them until after she died. Testimony in support of this statement was introduced. The defendant introduced testimony tending to show that the property was owned by Robert H. Foster at the time of his death, and showed his death, and the appointment of the defendant as his administrator. At the commencement of the case, the plaintiff offered to show that the marriage of Mrs. Johnson and Robert H. Foster was illegal and void. This was objected to, but the testimony was admitted. The court ultimately held that it was insufficient to overcome the proofs of cohabitation as husband and wife. The defendant's inventory of the estate of Robert H. Foster was admitted, against defendant's objections.

After instructing the jury that the plaintiff should recover if the jury should find that Mrs. Johnson was the owner of the property by reason of her alleged purchase, the court said further :

“Now, there is another question. If you should find the property belonged to the husband, as a matter of fact, originally, before he died, the law gives the widow certain rights in the property of her husband when he died,—the personal property, the chattel property. It gives her first \$250 worth of household furniture absolutely. It next gives her selection of \$200 worth of the remaining property absolutely. And then she is entitled to some other allowances. Then, after these allowances are made and the selections made, after taking these out, if the whole estate remaining does not exceed \$150, the law gives the rest of it to her,—the personal property. Now, whether the husband owned this property, or the wife owned it, in his lifetime, and died, and his personal property, outside of the household furniture, did not exceed \$350 in value, then it belonged to the wife. If inventoried to his estate, it would go to the wife, and that irrespective of the fact whether the probate court had made the assignment or not. I don't retract one word. That statute refers to personal property. If the personal estate does not exceed \$150 over and above these allowances, the personal estate goes to the wife. That statute regulates personal property alone.”

Counsel for the appellant asserts that the plaintiff should not have been allowed to recover upon the theory that Mrs. Johnson was the widow of Robert H. Foster, because he made no such claim in his opening, but, on the contrary, attempted to prove that she was not such widow, for the reason that the marriage was void. He claims further that the administrator was entitled to the property of Robert H. Foster's estate, and that the widow had no ownership of, or right to the possession of, it, as against him, until allowed to her by order of the probate court.

3 Comp. Laws 1897, § 9322, provides for the distribution of estates. Subdivision 1 thereof gives to the widow certain wearing apparel and household furniture. Section 9352 provides for a separate inventory and appraisalment

of the same, and that it shall not be considered assets in the hands of the representative. Subdivision 4, § 9322, provides:

“If, on the return of the inventory of any intestate estate, it shall appear that the value of the whole estate does not exceed the sum of one hundred and fifty dollars over and above the allowance above provided, the probate court may, by a decree for that purpose, assign for the use and support of the widow and children of such intestate, or for the support of the children under the age of ten years if there be no widow, the whole of such estate, after the payment of the funeral charges and expenses of administration.”

It is upon this that the portion of the charge complained of rests. We are of the opinion that the learned circuit judge has misinterpreted it, and that the widow can acquire no property under that subdivision except by an order of the probate court. We are therefore constrained to reverse the judgment and direct a new trial. It is so ordered.

GRANT, C. J., MONTGOMERY and MOORE, JJ., concurred with HOOKER, J. .

LONG, J. (*dissenting*). I am unable to agree with my Brother HOOKER on the interpretation which he gives to subdivision 4 of section 9322, 3 Comp. Laws 1897. This section is quoted at length in the opinion of my Brother HOOKER. Under its provisions, I think it became the duty of the probate court to assign the residue of the estate to the widow, if the residue did not exceed \$150. If the residue did not exceed this amount, the widow was entitled to it; and the court below was not in error in so charging the jury. I also think the provisions of section 9352 do not affect the question of the widow's right to receive the moneys provided by subdivision 4, § 9322.

The judgment should be affirmed.

W. & A. McARTHUR CO. v. OLD SECOND NATIONAL BANK
OF BAY CITY.

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122	223
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BILLS AND NOTES — AGENT FOR COLLECTION — BILL OF LADING —
CONSIGNMENT TO SHIPPER — PRESUMPTIONS. ¶

When a consignor forwards for collection, without other instructions, a sight draft, to which is attached a bill of lading showing a consignment to himself, indorsed by him in blank, the presumption is that he does not intend credit, but that it is a cash transaction, requiring payment by the drawee of the draft before delivery to him of the bill of lading; which presumption is not negated by the fact that the draft is entitled to three days' grace, and is considered in law as a time draft.

Case made from Bay; Maxwell, J. Submitted October 4, 1899. Decided December 12, 1899.

Assumpsit by the W. & A. McArthur Company, Limited, against the Old Second National Bank of Bay City, to recover the amount of a draft sent to defendant for collection. There was a judgment for plaintiff on verdict directed by the court, and defendant assigns error. Affirmed.

C. L. Collins, for appellant.

McDonell & Hall (*Watts S. Humphrey*, of counsel), for appellee.

LONG, J. The plaintiff is in the milling business, having its office and place of business at Cheboygan, this State. The First National Bank of Cheboygan does business there. The defendant does a banking business at Bay City. The plaintiff, at Cheboygan, on March 5, 1898, shipped a car load of wheat to Bay City, which had been sold by it to J. N. McDonald & Son, of Bay City. Upon such shipment it received from the railroad company a bill of lading showing that the wheat was consigned to

itself at Bay City. Plaintiff indorsed the bill of lading in blank, made a draft upon J. N. McDonald & Son, and delivered the draft, with the bill of lading so indorsed, to the Cheboygan bank for collection. The Cheboygan bank forwarded the draft, with the bill of lading so attached, to the defendant, at Bay City, with the following letter:

“CHEBOYGAN, MICH., March 7, 1898.

“OLD 2D, Bay City.

“*Dear Sir:* Inclosed as stated below for collection.

“Yours respectfully,

“A. W. RAMSAY, Cashier.

“J. N. McDonald & Son. No P. \$600. B. L. attached. Hold for arrival of goods, if necessary.”

The draft was dated March 5, 1898, made payable at sight, and indorsed by the Cheboygan bank: “Pay to Old Second National Bank, or order.” The bill of lading was in the usual form. In the body of the bill, under the name of the consignee, was a statement to the railroad company: “Notify J. N. McDonald & Son, Bay City, Mich.” It described one car of wheat. No other information or direction was given to the defendant, and it appears that the defendant had no notice of the dealings between McArthur & Co. and J. N. McDonald & Son, except such as could be inferred from the papers above set forth. The car load of wheat arrived in Bay City March 9th, and the railroad company, acting upon a waybill, which is a duplicate of the bill of lading, notified J. N. McDonald & Son of its arrival. The letter of instruction, draft, and bill of lading reached the defendant March 7th, and on that day was presented to J. N. McDonald & Son; but, the wheat not having arrived then, nothing was done. On March 11th the bank presented the draft to J. N. McDonald & Son, who wrote their acceptance thereon, and the bill of lading was delivered to them by the defendant. They presented the bill of lading, with the indorsement in blank of McArthur & Co. thereon, to the railroad company, who immediately delivered to them the car load of wheat. It appears that J. N. McDonald & Son were in-

solvent, and the draft was never paid. This suit was brought against the defendant to collect the amount of the draft, on the ground that the bank had been negligent in delivering the bill of lading to J. N. McDonald & Son upon the acceptance of the draft, and without the draft being first paid. There is no contention upon the facts. Upon the statements made by counsel in the court below, the court directed the verdict in favor of the plaintiff, and entered judgment thereon for the amount of the draft and interest, amounting to \$630.30. Defendant assigns error.

It is the claim of defendant's counsel that, under the circumstances above stated, it was the duty of the defendant bank to deliver the bill of lading to the drawee upon acceptance of the draft. This claim is based upon the proposition that a sight draft is a time draft, as it is entitled to three days of grace, and that, the consignor having indorsed the bill of lading, and sent the same forward with this time draft, with no instruction to hold the bill of lading until the draft was paid, such action conclusively negatives the presumption of intention to have the bill held until the draft was paid. It is conceded that such presumption might arise from the fact that the shipment was made to the shipper as consignee, but it is urged that such presumption is conclusively rebutted by the above facts.

It is undoubtedly well settled that a sight draft is entitled to three days of grace. *Story, Bills*, § 342; 2 *Edw. Bills & N.* (3d Ed.) § 714; *Cribbs v. Adams*, 13 Gray, 597; *Lucas v. Ladew*, 28 Mo. 342; *Thornburg v. Emmons*, 23 W. Va. 334; *Walsh v. Dart*, 12 Wis. 635; *Green v. Raymond Bros.*, 9 Neb. 295. It is also well settled that a blank indorsement upon a bill of lading is sufficient to pass the legal title to the goods, and that a delivery of goods by a common carrier to the consignee thereof is made at the peril of the carrier, unless, when made, the consignee surrenders the bill of lading either made to or indorsed to himself. *Coleb. Coll. Sec.* § 381; *Hobart v. Littlefield*, 13 R. I. 341; *Gates v.*

Railroad Co., 42 Neb. 379; *Weyand v. Railway Co.*, 75 Iowa, 580 (1 L. R. A. 650, 9 Am. St. Rep. 504). But we cannot agree with the contention of counsel for defendant that the fact that the bill of lading was indorsed in blank, and forwarded with the draft, under the circumstances here, negatives the presumption that the bill of lading was to be held until the draft was paid. The draft was sent to the defendant, as stated in the letter accompanying, for collection. The car load of wheat was not consigned to J. N. McDonald & Son, but to the plaintiff, who was the shipper. For the purpose of permitting J. N. McDonald & Son to at once get the wheat into possession, the bill of lading was indorsed, so that, when the draft was paid, there was nothing further to do by the defendant but to deliver the bill of lading to J. N. McDonald & Son, and the title to the wheat would at once pass to them.

Counsel, however, contends that the case is no different than as though the wheat had been consigned to J. N. McDonald & Son. There is, however, this difference: In case the consignment had been made direct to J. N. McDonald & Son, and no directions given for the collection of the draft, no presumption would have arisen that it was intended as a cash transaction, and the title not to pass until payment; but, the property being consigned to the shipper himself, showing that something further was to be done by him to pass the title, the presumption was that it was a cash transaction; and we think this presumption was not negatived by the fact that the draft was entitled to three days' grace, and considered in law as a time draft. We are satisfied that the transaction did not import a sale of the goods upon credit.

In *Security Bank of Minnesota v. Luttgen*, 29 Minn. 363, it appeared that a merchant, having received an order for goods from a foreign correspondent, shipped the goods by a common carrier, taking bills of lading, by the terms of which the goods were deliverable at their destination to the shipper or his order. The merchant then drew bills of exchange for the price of the goods on the

person ordering them, payable to the merchant's own order 30 days after sight. Attaching the bills of lading, indorsed in blank, to the drafts, and indorsing the latter in blank, the merchant had the drafts discounted at the bank, it being agreed in parol with the bank that the bills of lading should not be delivered until the drafts were paid. These drafts were sent forward by the bank to its correspondent, who presented them for acceptance, and they were duly accepted. Upon the acceptance of the drafts, and without payment, the bills of lading were delivered to the drawee, and the goods thus passed into his hands. The drawee shortly after this became insolvent, and the drafts were not paid. Action was commenced to recover against the drawer upon his indorsement of the drafts. The defense urged was that the bills of lading were to be treated as security for the payment of the drafts, and that the plaintiff had no right to deliver them to the drawee until such payment. It was held that, independent of the parol agreement, and considered as a matter of merely legal interpretation, the transaction did not import a sale of the goods on credit, or determine that the drawee was entitled to the bills of lading upon his acceptance of the drafts, and without payment. The court said:

“The taking of bills of lading making the goods deliverable to the order of the shipper, rather than to the person for whom they are ultimately destined, has been considered ‘almost conclusive’ proof of an intention on the part of the consignor to retain the *jus disponendi*, although subject to be rebutted;” citing *Benj. Sales* (3d Ed.), 382, 400; *Dows v. National Exchange Bank*, 91 U. S. 618; *Farmers & Mechanics’ Nat. Bank v. Logan*, 74 N. Y. 568; *Seymour v. Newton*, 105 Mass. 272; *Jenkyns v. Brown*, 14 Adol. & E. (N. S.) 496; *Mason v. Railway Co.*, 31 U. C. Q. B. 73.

In the case of *Bank v. Cummings*, 89 Tenn. 609 (24 Am. St. Rep. 618), in an opinion written by Mr. Justice Lurton, it was held, upon a very similar state of facts as found in the Minnesota case, that, where bills of lading attached to time drafts left with a bank for collection are

taken to the order of the vendor and drawer, instead of to the vendee and drawee, such fact is, when not rebutted by evidence to the contrary, almost conclusive to show that the bills were not to be surrendered to the vendee until the drafts should be paid, and is sufficient to require the bank to hold the bills until such payment. This is the rule recognized by Elliott in his work on Railroads (volume 4, § 1426).^{*}

Counsel for defendant cites many cases¹ which he claims have a tendency to support his contention. Those cases are readily distinguishable from the present and from the Minnesota and Tennessee cases. We do not deem it necessary to discuss the cases cited, as we are satisfied that a draft drawn as this was, and accompanied by a bill of lading showing that the shipper had consigned the goods to himself, is a clear indication that the shipper did not intend to extend credit.

The court very properly directed the verdict in favor of plaintiff. The judgment must be affirmed.

GRANT, C. J., MONTGOMERY and HOOKER, JJ., concurred. MOORE, J., did not sit.

¹ Viz.: *Lanfear v. Blossman*, 1 La. Ann. 148 (45 Am. Dec. 76); *Moore v. Louisiana Nat. Bank*, 44 La. Ann. 99 (32 Am. St. Rep. 332); *Nat. Bank of Commerce v. Merchants' Nat. Bank*, 91 U. S. 92; *Woolen v. Erie Bank*, 12 Blatchf. 359; *Marine Bank v. Wright*, 48 N. Y. 1.

DARROW v. VILLAGE OF HOMER.

ADVERSE POSSESSION—VILLAGE STREET—NONUSER.

Where a grantee of village lots abutting on land platted as an alley, but never used or occupied as such by the public or the village authorities, takes possession of all the land his grantor claimed to own, including that so platted, and holds the same adversely for a term which, together with his grantor's term, exceeds the period of limitations, he acquires a good title as against the village, although the land platted as an alley was not literally included in his deed. *Wyman v. Village of St. Johns*, 100 Mich. 571, distinguished.

Appeal from Calhoun; Smith, J. Submitted October 6, 1899. Decided December 12, 1899.

Bill by Charles E. Darrow against the village of Homer to enjoin the opening of an alley. From a decree dismissing the bill, complainant appeals. Reversed.

Le Bar Tompkins (Edward Darrow, of counsel), for complainant.

M. H. Nichols, for defendant.

MOORE, J. The complainant has appealed from a decree dismissing his bill of complaint, which was filed for the purpose of restraining defendant from opening an alley through a block in the village of Homer. A reference to the annexed plat, which, so far as its lines are concerned, is a copy of the plat as recorded, will aid in understanding the situation. The bill was filed in June, 1897. The complainant obtained the deed of his lots in March, 1883, from Dr. Collins and wife and Mr. Gibbs, trustee. It conveys lots 76, 77, and 78, situated in the village of Homer, according to the plat thereof as recorded in the office of register of deeds. It was the opinion of the circuit judge that complainant, under his conveyance, got

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and 84, lying just south of complainant's lots, were owned by Mr. Parks and his family for upwards of 50 years, and the evidence shows that the owner of these lots occupied for a long period of time to the center of what is shown on the plat as an "alley." At the opening of the alley, and near its center, but in the street, a tree was planted in 1864, which is now upwards of a foot in diameter. A barn was put up on the land now occupied by Darrow 17 years before the bill was filed, which is shown by the plat and survey made by the village surveyor to extend upwards of five feet into the alley, and it is stated by the witnesses that the barn was put upon what was supposed at that time to be the center of the alley. The evidence also discloses that, prior to the building of the barn, a fence was built upon what was supposed to be the center of the alley, as the boundary line between the lots south of the alley and those north of the alley. There were other trees set out in the alley, and some other outbuildings were partly in the alley. The record also discloses that in November, 1869, Dr. Collins obtained a deed reading in part as follows: "Said party of the first part conveys the south half of village lots 77 and 78, in said village, according to the plat thereof as recorded in the office of register of deeds for said county; and the said party of the second part agrees not to open the alley on the south end of village lots 77 and 78." Dr. Collins did not open the alley, but occupied his half of it, until he deeded lots 76, 77, and 78 to complainant, in March, 1883. The deed just mentioned to Dr. Collins was delivered by him to Mr. Darrow at the same time he made the deed to Mr. Darrow, and the latter took possession of all the land then occupied by Dr. Collins, and continued in possession of it up to the time of the filing of the bill.

The solicitor for defendant relies upon the case of *Wyman v. Village of St. Johns*, 100 Mich. 571, to sustain the decree. The cases are unlike. In the *Wyman Case* the street had been laid out and traveled for 30 years. Complainant's deed did not cover the premises in dispute,

and adverse possession for the requisite time was not shown. Here the alley was platted, but had never been used by the public or by the village authorities; and, while the alley was not included in the literal reading of the deed, it had been occupied by the grantor of the complainant for a long time when the deed by him to the complainant was made, and possession of the alley and the lots described in the deed was given to him at the same time, and remained with him until the bill was filed. The possession of the complainant and his grantor was for a much longer time than the statute requires to obtain title by adverse possession. We think the case is governed by *Field v. Village of Manchester*, 32 Mich. 279; *City of Big Rapids v. Comstock*, 65 Mich. 78; *Village of Grandville v. Jenison*, 84 Mich. 54; *Village of Essexville v. Emery*, 90 Mich. 183; *Flynn v. City of Detroit*, 93 Mich. 590.

The decree is reversed, and the temporary injunction will be made permanent.

The other Justices concurred.

PAHLAN v. DETROIT, GRAND HAVEN & MILWAUKEE RAILWAY CO.

1. RAILROAD COMPANIES—DUTY TO EMPLOYÉES—SAFE PLACE.

The requirement that employers shall furnish their employées with a reasonably safe place in which to work applies to its full extent to railroad companies.

2. SAME—COAL-BIN NEAR SIDING—JUDICIAL NOTICE.

Where the undisputed evidence shows that the place furnished by a railroad company to its employées conforms to the general condition upon other roads, the court may say, as a matter of law, that the company has performed its duty in this respect; and the court may properly so instruct the jury

122	232
d127	99
122	232
s81NW	108
122	232
s81NW	103
131	*594
122	232
s81NW	108
182	*540
122	232
d184	*580
d184	*581
122	232
145	*514
122	232
152	*149
h152	151

where the alleged defect is the maintenance of a coal-bin in close proximity to a siding, it being able to take judicial notice that those structures are commonly so placed.

3. SAME—ASSUMPTION OF RISK.

An employé of a railroad company, who, after dark, assisted in moving a detached way-car along a siding by pushing against a hand-rail on the front platform while he walked beside the car, assumed the risk of being injured by running against a coal-bin built close to the siding.

4. SAME—CONTRIBUTORY NEGLIGENCE—FAILURE TO SEE OBSTRUCTION.

An employé of a railroad company, who, on a dark night, assisted in moving a detached way-car along a siding by pushing against a hand-rail on the front platform while he walked beside the car, was guilty of contributory negligence in running against a coal-bin built close to the siding, where he might have seen the obstruction, had he looked out for it, at a distance of 10 feet.

Error to Ionia; Davis, J. Submitted October 6, 1899.
Decided December 12, 1899.

Case by Edward Pahlman against the Detroit, Grand Haven & Milwaukee Railway Company for personal injuries. From a judgment for plaintiff, defendant brings error. Reversed.

E. W. Meddaugh (*Geer & Williams*, of counsel), for appellant.

John Nichol and *James Curry, Jr.* (*Allen B. Morse*, of counsel), for appellee.

HOOVER, J. At Ovid station the defendant's railroad consists of three tracks, there being two sidings north of the main track. Upon the north side of the northernmost track there was a coal-bin, which was erected, some years before the occurrence giving rise to this action, by the Ovid Buggy Company, to receive coal shipped over the defendant's road. At the time of the accident, the side of the bin next the track overhung 8 inches at a height of

6 feet, according to the testimony of one of the plaintiff's witnesses, who said that he measured it. He testified that the distance between the top of the posts and a coal-car was about 8 inches, and between the post and the bottom of the car about 18 inches, and at the west end was about 1 inch nearer the rail than at the other end. He also testified that he measured six way-cars, four of which were of the width of the coal-car, and two were about 4 inches wider. He also testified that the bin was not too near the track for convenience in unloading coal. It was erected and maintained by the buggy company upon lands of the defendant, by its consent; and there was a dispute as to the cause of the overhang,—one side alleging that it was built so, and the other that it had spread. The plaintiff had been in defendant's employ as a section hand for about a year and a half, and had worked upon the gravel train for about a week, prior to the accident. He had been through Ovid upon the train with two loads of gravel, but was otherwise unacquainted with the yard. Upon the day in question, a load of gravel had been taken east of Ovid, and after it was unloaded the train returned to Ovid, where it was to remain for the night. On reaching Ovid, the gravel train entered upon the middle track (*i. e.*, the main siding), and the way-car was cut off; and, with a view to getting it ahead of the engine, orders were given to push it upon the north siding, and the plaintiff, with others, did so. This was after dark, and, as plaintiff was walking beside and pushing the car by the hand-rail at the front platform, he claims to have struck his shoulder against the coal-bin, and suffered an injury. The train was in charge of a conductor named Judd, and the workmen were at the time under a foreman named Grimes; the assistant road-master having left the train at another station. Some witnesses say the order was given by Grimes; and others, that Judd gave it. There was another man in front of the plaintiff, pushing the car, but his identity was not ascertained. Nothing indicates that he was injured. The negligence complained of was the

maintenance of the coal-bin so close to the track, in violation of defendant's duty to furnish a safe place for plaintiff to work. It was also urged that the work was performed under the direction of Grimes, who was a superior officer, and that in giving the order he represented the master.

It is definitely settled in this State that the master owes to the employé the duty of furnishing a reasonably safe place to work, and that this rule applies to railroads as well as other places. The authorities are collected in the cases of *Balhoff v. Railroad Co.*, 106 Mich. 613, and *Anderson v. Railroad Co.*, 107 Mich. 595. It is urged that a railroad company has a right to construct its road and structures after plans of its own, and not subject to the approval of juries, who cannot be allowed to determine such questions. This is equivalent to saying that the doctrine that a master must furnish a reasonably safe place for his employé to work does not apply to railroads. We appreciate the practical consequences of leaving such a question to a jury, and the proneness of such tribunals to accept the fact of an accident as sufficient evidence of fault upon the part of the master. We should hardly like to admit that lawyers and juries know more about proper railroad building than those experienced therein. But, on the other hand, we cannot say that railroads are free from defects, or the owners and their employés from negligence; nor is there authority or reason for exempting them from the general law pertaining to master and servant. Many of the cases cited were railroad cases, and we repeat that the question is settled for Michigan; and, wherever the fact is fairly in dispute, we see no way for railroads to avoid the submission of the question to a jury. There are cases, however, when no dispute arises; *e. g.*, when the undisputed evidence shows that the place furnished by the master conforms to the general condition upon other roads, or where the defect is a known or obvious one to the employé, or one of which he is bound to take notice. In the former the court may say, as a matter of law, that there is no negligence; in the latter, as well as the former,

that the employé has assumed the risk obviously incident to the conditions, whether defective or not.

It is a well-known fact, of which we may take judicial notice, that it is usual for sidings to be so constructed as to permit cars to stand close to buildings, thereby facilitating the loading and unloading, and reducing the cost and danger of the operation. This is uniformly true of elevators and coal-bins, and every person of common intelligence may reasonably be presumed to know that the siding is made for such purposes, to which, perhaps, a main track could not be safely applied, by reason of the duty owed to passengers, if not to employés. *Phelps v. Railway Co.*, ante, 171. The plaintiff admits that he knew of this practice on defendant's road. It being the common practice upon railroads to thus locate structures, it cannot be negligence, for the test of negligence is, What is usual in railroading? and a trial court should not hesitate to say to a jury that it is not negligence for a railroad company to build or permit the erection and maintenance of coal-bins in close proximity to sidings, and that one who enters the employment of a railroad company must expect to find them and other structures, such as depots and their awnings, bridges, warehouses, water-tanks, elevators, etc., and that he assumes the risks incident to railroading in such places, in the night as well as the day, and the first time over the road as well as on subsequent trips. The brakeman must keep his eyes open for such obstructions, if he chooses to climb or work upon the cars, just as he should look out for trains approaching or standing upon an adjoining track when climbing a ladder on the side next such track.

There are cases which hold that an employé cannot be held to have assumed a risk of conditions that he has had no previous opportunity of becoming acquainted with. The leading case upon this subject appears to be *Dorsey v. Construction Co.*, 42 Wis. 533. In that case a cattle-chute was erected near the track, and a brakeman was drawn against it while climbing a ladder upon a car. It

was in plain sight, and the brakeman had frequently seen it; yet the court held that it did not follow that he was aware of danger, because it was not shown that he knew the precise distance between the chute and the car. A similar rule was applied in a case where the plaintiff was carried against a signal post erected between tracks. The court said he might not have known that it was near enough to do him injury, unless he had made actual measurements or calculation. *Johnson v. Railway Co.*, 43 Minn. 53. This is equivalent to holding that a brakeman may assume that there will be no obstruction within striking distance, and that until his attention has been called to the danger, or he has seen fit to ascertain the distance by measurement, he does not assume the risk of accident therefrom. We think these cases are at variance with the weight of authority, and the requirement of reasonable prudence on the part of employes.

One who engages in railroading may be presumed to understand the nature of the work he is entering upon, and, if he is not acquainted with the particular dangers of the line upon which he is to work, it is his duty to give attention to them. He must be on the lookout for buildings near the tracks, and to know what persons usually know of the uses of side tracks, and such dangers as naturally follow. A master has a right to expect ordinary caution, and need not point out dangers that will be seen and known but for inattention and thoughtlessness. It cannot be expected that he will give the employé a list of structures, and their respective distances from trains or tracks, or that he will send the newly-employed servant over the line and sidings with a rule, to measure them. He may assume that the structures will be seen, and that, when there is doubt about the exact distance from the track, the risk will be avoided. It is manifestly unsafe for one to attempt to pass between a building in close proximity to the track, and a car, especially on a dark night. This plaintiff was chargeable with knowledge that he was liable to encounter such buildings upon a

siding at the station, and, if it was so dark that the building was not easily discernible, increased vigilance was required. It was unnecessary to walk upon that side of the car, if it was necessary to walk upon either side, and in so doing we think that the plaintiff assumed the risk of meeting this obstruction.

It may be urged that the overhang of the shed, and its position in relation to the track, show that it was out of repair, or a trap. It is the common custom to set structures of all sorts nearer the track than was the topmost part of this bin; but it is unnecessary to pass upon these questions, as the plaintiff's testimony shows that he was not trapped, but walked against the end of the shed.

There is another point that should settle the case. The proof shows that the plaintiff walked up to and against this shed, when he should have seen it. It is evident that the man in front of him saw it in time to avoid it. While it occurred in the night, there is no testimony that shows that it was so dark as to prevent the building from being seen before running against it. The plaintiff's own testimony is that: "It was dark. You couldn't see *much* of anything." His witness Weirs said that: "It was a dark night. Couldn't see *much* ahead of you. I couldn't see an object more than 10 feet, to tell what it was." William Wall said: "I could see an object the size of a man 10 feet away on that night, but I don't think you could have told who it was. Q. When was your attention first called to the fact you could see a man 10 feet away? A. I saw some of them going upon the track." Lee Perry said: "I know the plaintiff. I saw him in the depot after the accident, some time between 6 and 7 o'clock, standard time. It was a very dark night. It wasn't raining." Elmer Settle said: "It was dark. I couldn't really tell just where Pahlman was, but, as near as I can tell, he was right across from me, pushing. It was a pretty dark night. I saw them take him out from under the car. I noticed the coal-shed." The almanac shows that the moon was at the first quarter (*i. e.*, half full),

and set after 10 o'clock, upon that night. The plaintiff testified that he was pushing the car along, when his shoulder struck against the end of the coal-bin. By his testimony we think it conclusively shown that he was negligent.

The court should have directed a verdict for the defendant. Judgment reversed, and new trial ordered.

GRANT, C. J., and LONG, J., concurred.

MONTGOMERY and MOORE, JJ. Because the case is controlled by *Phelps v. Railway Co.*, ante, 171, we concur in the opinion of Justice HOOKER.

In re LAMB'S ESTATE.

WILLS—CONSTRUCTION—CONDITIONAL DEVISE.

Under a will devising testatrix's property to her brothers and sisters, share and share alike, but providing that, in case of the death of any legatee "previous to the probating or execution" of the will, his share should go to his children, the children, and not the assignee, of a deceased legatee are entitled to his share, where his death occurred after the probate of the will, but prior to its execution by settlement of the estate.

Certiorari to Van Buren; Smith, J. Submitted October 6, 1899. Decided December 12, 1899.

Petition in probate court by James H. Hall, executor of the last will and testament of Catherine Lamb, deceased, for a construction of the will. Annetta Tillou, one of the children of Carlton Ray, deceased, a legatee under the will, appealed to the circuit court, and from a judgment in her favor the executor brings *certiorari*. Affirmed.

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Catherine Lamb died testate. Her will provided as follows:

"I give and bequeath to Benjamin Ray, Carlton Ray, Samuel Ray, Nancy Sumner, Marilla Smith, Julia Hopkins, Mary Carnes, Jane Hoffman, and Lovina Taylor (all of whom are my brothers and sisters) all the real estate and personal estate of which I may be possessed at the time of my decease, to be equally divided between them, share and share alike. But in case of the death of any of the above-named legatees *previous to the probating or execution* of this, my last will and testament, then I desire, will, and bequeath that the share of such deceased brother or sister shall revert to, and become the property of, the children of said deceased legatee; but, if said deceased legatee has no children living at the time of my decease, then the said deceased legatee's share of property bequeathed to him or her by the terms of this will shall revert to, and become a part of, the general fund to be divided among the surviving legatees named in this will and testament."

She died April 3, 1898. Her will was admitted to probate, and letters testamentary were granted to defendant, June 13, 1898. Carlton Ray died December 18, 1898, before the distribution of the estate. Prior to the probating of the will, Mr. Ray assigned to his wife all his interest as devisee and legatee under the will. He left two children. January 21, 1899, the executor filed a petition in the probate court praying a construction of the will. From the decision of the probate court an appeal was taken to the circuit court, and judgment entered holding that Mr. Ray's share did not pass by his assignment to his wife, and that it passed to his children, since he died before the estate was finally administered and settled.

A. J. Mills, for appellant.

B. F. Heckert, for appellee.

GRANT, C. J. (*after stating the facts*). The decision depends upon the construction to be placed upon this clause of the will:

"But in case of the death of any of the above-named legatees previous to the probating or execution of this, my last will and testament, then I desire, will, and bequeath that the share of such deceased brother or sister shall revert to, and become the property of, the children of said deceased legatee."

Manifestly, the term "execution" does not apply to the act of signing and publishing her will. It refers to something to be done after her decease. Certain cardinal rules must be kept in mind. The intention of the testator must be determined from the four corners of the instrument. *Bailey v. Bailey*, 25 Mich. 185, 188; *Fraser v. Chene*, 2 Mich. 81, 88. Wills must be construed so that the distribution will conform as nearly to the general rule of inheritance as the language will permit. *Rivenett v. Bourquin*, 53 Mich. 16, and authorities cited. Words must be given their ordinary significance, and testators must be held to have meant something by the words used, unless the contrary clearly appears. To probate a will is not to execute it. To probate involves only a determination that the will was duly signed and published, and that the testator was competent to make it. It simply establishes the validity of the will. Its execution comes after its probate. The executor has no control over the estate until the probate of the will. The executor is the person appointed to "carry the will into effect or execution after his decease, and to dispose of his property according to the tenor of the will." 1 Burrill, Law Dict. 584. Counsel concedes that Mr. Ray took a conditional estate,—the condition being that he live until the proof or probate of the will. This construction would eliminate from the will the words "or execution," as it would leave them no office to perform. We cannot hold that the testatrix used the word "execution" as synonymous with "probating." Persons of common intelligence know what it is to probate a will. We think it manifest that the intention was to devise her property to her brothers and sisters, and to their children in case of their death before her will was

executed. The term "execution" was, in our judgment, used with reference to the act of the executor in executing the will by settlement of the estate under the provisions of law for the settlement of estates of deceased persons, and distributing the property to her legatees. At her death Mr. Ray received an estate upon the sole condition that he live until the will was executed, and the property ready for distribution. This was the construction placed upon similar language in *Scott v. Guernsey*, 60 Barb. 163, 175, and *Lambert v. Harvey*, 100 Ill. 338, and is not in conflict with *Calkins v. Smith's Estate*, 41 Mich. 409. The word "or" is often construed to mean "and," and its use is a common mistake in wills as well as elsewhere. 1 Jarm. Wills (6th Ed.), 505; 2 Burrill, Law Dict. 263.

We think the court reached the correct conclusion. Judgment affirmed, with costs.

The other Justices concurred.

MACTAVISH v. KENT CIRCUIT JUDGE.¹

1. INSURANCE—BILL TO CANCEL POLICY—AVERMENTS.

That an insurance company's bill to cancel a policy for fraud of the insured, and to enjoin the beneficiary from prosecuting a pending action at law thereon, alleges that complainant has assumed to cancel and annul the policy, does not show that it was unnecessary for the company to invoke the aid of equity, it being evident that the validity of the company's attempt at cancellation is denied, and must be determined by the courts.

2. EQUITY—INJUNCTION.

Although injunction is usually refused where defendant answers fully, denying all the allegations of the bill, the grant, ing it, even under such circumstances, is within the discretion of the court.

¹ Rehearing denied January 23, 1900.

122 242
s80W1086
182 ' 6
e188 ' 69
122 242
d136 213
f136 405
122 242
e143 '150
e143 '155
143 157
f143 '159
f143 '162
f144 '219

3. SAME—MANDAMUS TO COMPEL DISSOLUTION OF INJUNCTION.

On *mandamus* to compel the dissolution of an injunction restraining an action at law, it is unimportant that the injunction bill failed to allege the state of the pleadings in the action sought to be enjoined; counsel having had opportunity to bring the subject to the attention of the court on his motion to dissolve the injunction.

4. SAME—POINT PROPERLY RAISED BY DEMURRER.

Nor is it important that the injunction bill contained no allegation that the legal remedy was inadequate, the point being one properly raised by demurrer.

5. SAME—JURISDICTION—ENJOINING ACTION IN ANOTHER COURT.

Relator brought an action on a fraternal society's benefit certificate. Subsequently the society filed a bill in the circuit court of another county to cancel the certificate on the ground that it was procured by fraud, and the latter court, sitting as a court of equity, enjoined the prosecution of the action at law pending the determination of the suit in equity. *Held*, that the circuit court of such other county, sitting in equity, had power, in its discretion, to issue such injunction, and that its action in so doing could not be reviewed by the Supreme Court.

Mandamus by Maggie Mactavish to compel Allen C. Adsit, circuit judge of Kent county, to dissolve an injunction. Submitted October 24, 1899. Writ denied December 12, 1899.

Lee E. Joslyn, for relator.

Wanty & Knappen, for respondent.

HOOKE, J. The relator brought an action upon a fraternal society beneficiary certificate in the circuit court for the county of Bay. Subsequently the defendant in that action filed the bill in this case for cancellation of the certificate upon the ground of fraud alleged to have been committed in procuring the certificate, and an injunction *pendente lite* was issued by the Kent circuit court, sitting in chancery, restraining the plaintiff in the original action from further prosecuting said action. An affidavit was filed, denying the fraud, in conjunction with a motion to

dissolve the injunction; and, said motion being denied, we are asked to compel the circuit court to dissolve the injunction. The grounds relied on by counsel for relator appear to be:

1. That the bill alleges that the society assumed to cancel and annul the certificate, and therefore it is unnecessary to invoke the aid of equity to the same end.

2. That the material allegations of the bill are denied by affidavit, and that this entitled the relator to a dissolution of the injunction.

3. That the court had no jurisdiction to grant the injunction, (a) because the pleadings in the original case were not fully set up in the bill; (b) because it failed to allege injury or want of complete remedy at law.

It is an established rule that the court will not interfere with the discretion of a circuit judge in relation to injunctions. Instances are rare where appellate courts will compel lower courts to issue them, and they will seldom compel a dissolution unless the injunction has been issued, or dissolution refused, in contravention of law.

The first and second propositions require only a passing notice. The relator does not admit the binding force of the company's attempt at cancellation, and the company is compelled to submit the question of its right to a cancellation to some court of justice. It is true that there is a general rule that when a defendant answers fully, and denies all of the allegations of the bill, a preliminary injunction will usually be denied. There are, however, cases where this rule is not followed, and it is a matter of judicial discretion.

The failure of the bill to allege the state of the pleadings in the action at law is unimportant. Doubtless, counsel brought the subject to the attention of the circuit court in chancery on the motion to dissolve; and, if not, he has only himself to blame.

If the allegation of inadequacy of remedy at law is wanting, the point should have been raised by demurrer.

The principal effort of counsel appears to be directed towards inducing us to overrule the case of *John Hancock*

Mut. Life Ins. Co. v. Dick, 114 Mich. 337 (43 L. R. A. 566), and, failing in that, to show a distinction between that case and the present, inasmuch as the injunction is issued from the court of a different county from that in which relator's action was brought. The case of *John Hancock Mut. Life Ins. Co. v. Dick* was carefully considered. The question there was not whether it was a hardship upon the plaintiff to be compelled to try the question of fraud in equity, rather than before a jury, but—*First*, whether equity has jurisdiction to cancel a contract obtained by fraud; and, *second*, whether such jurisdiction is cut off by the institution of a prior action at law upon the writing. There is but one answer to these questions. The jurisdiction of equity for cancellation is well settled, and courts cannot curtail such jurisdiction because the same evidence that would justify a decree of cancellation may constitute a defense to an action upon the instrument. The authority to restrain the pending action at law is based upon the equitable jurisdiction to prevent a multiplicity of suits, and this is as well established as any other jurisdiction of equity. Then, the fraternal society had a right to sue in equity, and the court must entertain the suit. It might or might not restrain the beneficiary from prosecuting the pending action at law. That was a matter for the discretion of that court, and not for us. These propositions are elementary, and, as shown in *John Hancock Mut. Life Ins. Co. v. Dick*, are fortified by authorities. The briefs in this case furnish additional support to the claim of respondent.

It is urged that the circuit court for the county of Bay first obtained jurisdiction, and that no other court could deprive it of such jurisdiction, or itself take jurisdiction of this controversy. What force there is in this contention applies to cases where two courts have concurrent jurisdiction. These courts have not concurrent jurisdiction, for the court of law has no power to cancel, as was shown in the case of *John Hancock Mut. Life Ins. Co. v. Dick*, which is a case upon all fours with the present.

It is urged that the authority to enjoin a pending action at law is confined to the court of chancery for the county in which the action at law is pending, but we do not so understand it. The injunction restrains the party, not the court, and any court having jurisdiction of the subject-matter has authority over the party before it. No one can question the jurisdiction of the Kent circuit as to the subject-matter before it. It may go on and decree cancellation, and, but for the pendency of this action in another county instead of Kent, it might restrain the party from pursuing a remedy at law. This jurisdiction originated when law and equity courts were separate. What it is that has deprived the court of chancery of its power to restrain proceedings in any other court except that held by the chancellor himself as a law judge is not made plain. In Indiana it rests on a statute, which is manifestly sufficient. See *Indiana, etc., R. Co. v. Williams*, 22 Ind. 198. But elsewhere the authority is recognized. *Erie R. Co. v. Ramsey*, 45 N. Y. 637; *New York, etc., R. Co. v. Schuyler*, 8 Abb. Prac. 239; *Platt v. Woodruff*, 61 N. Y. 378; *Cushman v. Leland*, 93 N. Y. 652. It has never been denied in this State, and, as counsel suggest, *Turner v. Hatch*, 100 Mich. 65, and *Hogan v. Wayne Circuit Judge*, 106 Mich. 254, were cases where that very thing was done. Again, cases can be found where one court of chancery has restrained parties before it from proceeding in chancery proceedings before other courts, which would be inconsistent with relator's contention.

This attack upon a well-settled chancery jurisdiction has as a foundation the proposition that a person claiming under an insurance policy has a right to try the question of fraud before a jury, and therefore equity should in all cases permit the case to be tried by jury. But counsel does not stop there; he would have us go further, and hold that a chancellor has no discretion, but must yield his own jurisdiction in all such cases, and that, if he does not, we will compel it. There would be no more propriety in our

curtailing equity jurisdiction than there would be in denying some legal jurisdiction. But suppose we were to do so, and hold that equity could not restrain the prosecution of an action of this sort; what should we do where the suit for cancellation is begun first? Will the next step be the contention that we should deny the jurisdiction of chancery in such a case because we may think the right to make a legal defense is remedy enough? If so, and we yield to it, all concurrent jurisdiction would be taken from equity; and not only that, but the same would be true in all cases where, as in this case, equity has jurisdiction to give greater relief than a court of law can do. The right to equitable procedure and relief would not then depend upon established rules, but upon the question whether the complainant ought to be satisfied with some lesser relief, which, in the opinion of an appellate court, would, or could be made to, answer his purpose. We understand that equitable rights are as sacred and as well guarded by the Constitution as the right of trial by jury, and we see neither the occasion nor the opportunity to increase the latter at the expense of the former.

The court of equity can do full justice in this case, and, in the opinion of the judge of that court, the case is one which equity, rather than a jury, should try. In this we must assume that the judge was right. We cannot review that question.

The writ is denied.

The other Justices concurred.

122	248
80W	1080
130	487n
122	248
f149	176

VINING v. DETROIT, YPSILANTI & ANN ARBOR RAILWAY.

STREET RAILWAYS—COUPON TICKETS—RIGHTS OF PASSENGER.

Where a coupon ticket was issued to plaintiff for carriage between A. and C., through the intermediate point B., over defendant's line from a point east of B. to C. and over a connecting line from A. to such point, and the conductor on the connecting line detached by mistake the coupon "B. to C.," leaving plaintiff the "A. to B." coupon to present to defendant's conductor for passage to C., the conductor was bound to honor the ticket for carriage as far as B., and his attempt forcibly to eject plaintiff before the car reached B. was an assault, for which defendant was liable.

Error to Wayne; Carpenter, J. Submitted October 24, 1899. Decided December 12, 1899.

Case by Edward M. Vining against the Detroit, Ypsilanti & Ann Arbor Railway for an assault by defendant's conductor. From a judgment for plaintiff, defendant brings error. Affirmed.

J. Emmet Sullivan, for appellant.

Rice & Meeker, for appellee.

HOOVER, J. The Detroit Citizens' Street-Railway line extends to a place called "Addison's Switch," which is a half-mile or thereabouts east of the place where the defendant's road is crossed by the Flint & Pere Marquette Railway. The Detroit, Ypsilanti & Ann Arbor Railway (defendant's road) extends from Addison's Switch to Ann Arbor, passing through the village of Wayne. These two street-railway companies had a running arrangement under which the cars of the latter road ran over the track of the former to the city hall in Detroit, coupon tickets being sold. The conductor of the Citizens' Company took charge of the car between the F. & P. M.

crossing and city hall, while the defendant's conductor had charge west of the F. & P. M. crossing. Thus each conductor took up tickets for his own road. The plaintiff took the car at the city hall. His ticket consisted of two coupons. One, headed "Detroit, Ypsilanti & Ann Arbor Railway," said, "Good for one fare between Wayne and F. & P. M. crossing;" the other, headed "Detroit Citizens' Street Railway," said, "Good for one fare between F. & P. M. crossing and city hall." The ticket was purchased at Wayne, and was a double ticket, one-half of it having been used by the plaintiff in going to the city. On his return he handed his ticket to the conductor of the Citizens' Company, who took off the wrong coupon, viz., the portion over the defendant's road. At Addison's Switch the defendant's conductor took charge of the car, and the conductor of the Citizens' Company left it. Plaintiff handed defendant's conductor the remaining coupon, and was told that it was not good. Plaintiff replied that the other conductor had made a mistake, but was told that he would have to get off or pay his fare. He refused to pay his fare or get off, and told the conductor he would have to put him off. The conductor took him from his seat, and then he paid the fare under protest. The plaintiff and one of his witnesses testified that he was taken from his seat before the car reached the F. & P. M. crossing. The conductor and motorman say that this was done when the car stopped for that crossing, and upon the F. & P. M. right of way, where they were in the habit of stopping before crossing that road. That, in a sense, was east of the F. & P. M. crossing; but, as said by the learned circuit judge, that was as far as the plaintiff was entitled to ride upon that ticket. But, as the plaintiff testified that the car stopped again east of the F. & P. M. crossing, it was for the jury to decide who was right, and we cannot say that the testimony conclusively showed that the assault was not committed before reaching the usual stopping place at the F. & P. M. crossing.

Error is assigned upon the introduction of Exhibit C,

which was an ordinance of the village of Wayne fixing rates of fare. As the case turned, it does not seem to have been important, and we are not able to see that the defendant was injured by it. We see no reason for thinking that it confused or misled the jury, and, if counsel for the plaintiff based an improper argument upon it, our attention is not called to it.

There is no force in the proposition that the plaintiff had not paid his fare to the F. & P. M. crossing. If he had not given the conductor of the Citizens' Company the right ticket, he had it still in his possession, and his delivery of it to the defendant's conductor was sufficient to protect him from ejection before reaching the F. & P. M. crossing. This case differs from *Mahoney v. Railway Co.*, 93 Mich. 612 (18 L. R. A. 335, 32 Am. St. Rep. 528). In that case the plaintiff had no evidence of his right to ride on the car. In this case he had evidence of his right to ride to the F. & P. M. crossing. The conductor testified that it is usual to stop the car before crossing, and not upon the track, and the court told the jury that plaintiff had a right to ride to that point. We think the defendant has no reason to complain of this, and that it was equivalent to giving defendant's fifth request.

The judgment is affirmed.

The other Justices concurred.

BROWN v. BOYNTON.

LIBEL—CHARGES NOT DEFAMATORY.

A published letter charging that plaintiff got up a raffle for the benefit of the writer without his consent; appointed a committee of a fraternal organization to manage it; said he had received no money from it; that some of the members of the organization had purchased tickets; that the intended beneficiary received nothing from it; and that the facts were published so that the members might get their money back,—is not libelous, as charging or imputing that plaintiff was guilty of falsehood, deceit, fraud, or misconduct as a member of said organization, or that he had obtained money by false pretenses, and had embezzled or misappropriated it. HOOKER and MONTGOMERY, JJ., dissenting.

Error to Wayne; Hosmer, J. Submitted October 25, 1899. Decided December 12, 1899.

Case by Samuel J. Brown against Nathan S. Boynton and Albert Gladman for libel. From a judgment for defendant Boynton on demurrer to the declaration, plaintiff brings error. Affirmed.

This was an action of libel for publishing the following letter in a newspaper called the "Michigan Maccabee:"

"A LETTER FROM ALBERT GLADMAN.

"DETROIT, May 30, 1897.

"EDITOR OF THE MICHIGAN MACCABEE: I notice in the Michigan Maccabee, May 20, an article copied from a Detroit paper called 'This Week,' dated May 1. I will state the facts of the case just as they are. 'This Week,' the Detroit paper, will retract its former statement, and publish the facts in the case from my side. The distress and misfortune part is too true; also, the raffle came off as planned. But the raffle scheme was got up by Sir Knight Brown against my wishes, and was done when I was home with my sick family, and did not know it till after Brown had appointed his own committee and had the

tickets printed. Grand River Tent, 409, the tent to which I have belonged for nearly four years, voted against the scheme, for which I am very thankful. Grand River Tent, 409, helped me and my family out kindly and nobly, and carried my assessment No. 70, and voted and loaned me money, and the tent sympathizes with me and mine. Now, the lot is not a city lot, but a lot away out in Romulus. The raffle came off, but 'This Week' states that I am in possession once more of home, which is not correct. I have not received one cent from the raffle, and the mortgage is in the hands of the collector to foreclose, and take my home from me. The man who holds the mortgage told Brown and Henderson to settle, or not bother him any more, and they told him that they had got no money. I wish, in justice to Grand River Tent, myself and family, that you would kindly state these facts about this scheme, so that the tents and sir knights who bought tickets will get their money back.

"Yours fraternally,

"ALBERT GLADMAN,

"Grand River Tent, 409."

The declaration contains two counts, but the innuendo to the second count is a sufficient statement for plaintiff's claim, and is as follows:

"Thereby meaning and intending to charge that the plaintiff had, without the knowledge or consent of said Albert Gladman, got up a raffle and sold tickets and obtained money for the alleged benefit of said Albert Gladman, and that the said Albert Gladman did not receive one cent of said money, and that the plaintiff and Henderson had obtained money as the proceeds of said raffle by false pretenses and representations, and embezzled said money; thereby imputing to the plaintiff the commission of the crime of obtaining money by false pretenses and representations, and also the crime of embezzlement, and charging and imputing to the plaintiff falsehood, deceit, fraud, and misconduct as a member of said Grand River Tent, 409, and obtaining money of members of said tent and other kindred tents, and of the individual members of said tent and other kindred tents, by falsehood, deceit, and fraud, and by false pretenses and representations, and with having misappropriated said money."

To this declaration defendant Boynton interposed a demurrer for the following reasons:

"1. Said declaration nowhere states that the article mentioned therein as having been published in 'This Week' was true, or that the matter contained in the article published in that paper and the statements made therein were correct.

"2. The construction put upon the article published in 'The Michigan Maccabee' by said plaintiff is neither a legal nor a natural construction.

"3. The language contained in the article charged in said declaration to have been published in 'The Michigan Maccabee' does not bear out the construction put upon it by said plaintiff in said declaration.

"4. The article alleged in said declaration to have been published in 'The Michigan Maccabee' is not libelous, and it does not bear the construction put upon it by said plaintiff in his innuendoes in said declaration.

"5. Neither count in said declaration states a legal cause of action against said defendant Nathan S. Boynton."

The demurrer was sustained.

Lehman Bros. and F. J. Riggs, for appellant.

Durand & Carton, for appellee.

GRANT, C. J. (*after stating the facts*). A libel is a malicious publication, tending to expose a person to contempt, ridicule, hatred, or degradation of character. *Barr v. Moore*, 87 Pa. St. 390 (30 Am. Rep. 367), and authorities cited. "Words are to be understood in their plain and natural import, according to the ideas they are calculated to convey to those to whom they are addressed." 13 Am. & Eng. Enc. Law, 378. Or, as Lord Ellenborough stated in *Roberts v. Camden*, 9 East, 93, 96, "words are now construed by courts, as they always ought to have been, in the plain and popular sense in which the rest of the world naturally understand them." *Wieman v. Mabee*, 45 Mich. 484 (40 Am. Rep. 477); *Brettun v. Anthony*, 103 Mass. 37. What the article referred to in the communication as having appeared in *This Week* was, does not appear. It is not given. It is certainly not defamatory to say that that paper "will

retract its former statement, and publish the facts in the case from my side." Neither is it defamatory to say that plaintiff got up the raffle without the consent of the defendant Gladman, or that the defendant Gladman was opposed to it. To oppose it would be very creditable. There is no defamation in the statement that the defendant Gladman had received nothing from the result of the raffle, or that the mortgage was still in the hands of the collector to foreclose. The letter does not charge that plaintiff had received any of the money resulting from the raffle, or that he had anything to do with the matter any further than to appoint a committee. The article cannot be fairly construed into charging plaintiff with having received the money, and a refusal to pay it over. Fairly construed, it means no more than that plaintiff got up a raffle without the consent of defendant Gladman; that he appointed a committee to take charge of it; that defendant Gladman has received nothing from it; that plaintiff said he had received no money from it; that some members purchased tickets (but does not charge that they were purchased of the plaintiff); and that defendant Gladman states the facts, so that those who bought may get their money back. There is nothing in the article which can be construed into charging criminal or degrading conduct on the part of the plaintiff. No claim is made in the brief of counsel for the plaintiff that this article is libelous because it charges him with engaging in a lottery scheme. If this were so, the article would clearly be libelous, and the judgment should be reversed. The only reason claimed for holding that this article is libelous is that it imputed the crime of obtaining money by false pretenses and the crime of embezzlement.

Judgment affirmed.

MOORE and LONG, JJ., concurred with GRANT, C. J.

HOOKE, J. (*dissenting*). I am of the opinion that the demurrer should not have been sustained. It is

obvious that the alleged article charges a crime under 3 Comp. Laws 1897, § 11344, which punishes by fine not exceeding \$2,000, or imprisonment not exceeding one year, those who engage in lottery schemes. This makes it libelous *per se*. To my mind, the language of the article declared upon is susceptible of the interpretation given it by the innuendo, viz., that the plaintiff had procured money from the friends of the defendant Gladman upon a raffle gotten up by the plaintiff for the professed purpose of relieving the necessities of the defendant Gladman, but that he had not applied it to such purpose, and had denied having received any money from the raffle. It is said that the words must be given their natural meaning, which forbids such a construction; but this cannot be, or there would be no occasion for the use of innuendoes. Words many times do not, upon their face, fully convey the meaning intended or understood. Sometimes, when used ironically, they mean the exact opposite of their commonly understood meaning. It is competent to show this by the circumstances under which they are used, but in such cases an innuendo becomes necessary. The meaning may depend upon the inflection, emphasis, or manner of the speaker. So, when the libel consists of a picture. 13 Am. & Eng. Enc. Law, 394; *Edwards v. Chandler*, 14 Mich. 471 (90 Am. Dec. 249); *Ewing v. Ainger*, 96 Mich. 593; *Simons v. Burnham*, 102 Mich. 193 *et seq.* It is elementary that, when words are susceptible of two or more constructions, the jury must determine the meaning (13 Am. & Eng. Enc. Law, 378 *et seq.*, and 385); and we should not apply the rule that words are to be understood in their plain and natural meaning where the circumstances (as set up in an inducement or indicated by the alleged libel) under which they were spoken or published show that they were intended and understood differently. We are not trying the merits of this case, and we must take these words as charged. If we do, they are libelous, both because they charge a crime, and because they charge dishonesty in withholding funds received for a given purpose.

The order of the circuit court should be reversed, and the cause remanded for further proceedings.

MONTGOMERY, J., concurred with HOOKER, J.

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80	1088
188	122
122	256
137	8

IMPROVED-MATCH COMPANY v. MICHIGAN MUTUAL FIRE INSURANCE CO.

1. PROCESS — DEFECTIVE SERVICE — WAIVER BY PLEADING TO MERITS.

In a civil action, not involving deprivation of liberty, pleading to the merits, after the denial of a motion to quash for defective service, operates as a waiver of the defect.

2. INSURANCE—SOLICITING AGENT.

One who, after being informed by the general manager of an insurance company that the company would issue policies for him on acceptable risks, and would allow him commissions, placed several policies for the company, and collected and forwarded the premiums, will be held to have acted in a particular transaction, in which he solicited insurance for the company, as its agent, and not as the agent of the insured.

3. SAME—CONDITIONS—FACTS KNOWN TO AGENT—ESTOPPEL.

The provisions of a fire-insurance policy declaring it void if the subject of insurance be a manufacturing establishment, and be operated later than 10 o'clock at night, and denying the authority of agents to waive any condition of the policy except by written agreement duly indorsed, will not avail the insurer as a defense, where the subject of insurance, a factory, is destroyed by fire while being operated after 10 o'clock, if the insurer's agent who solicited the insurance and delivered the policy understood that the factory was in operation day and night; the insurer, under such circumstances, being deemed to have issued the policy with knowledge of all the facts, and to be therefore estopped from setting up the same as a defense.

4. SAME—PROOFS OF LOSS—WAIVER.

Where an insurance company is informed by the insured of a loss, and immediately answers that the policy has been canceled on account of violations of conditions in the policy, no proofs of loss are necessary.

5. SAME — EVIDENCE OF LOSS — DIVISION AMONG DIFFERENT CLASSES OF PROPERTY.

A judgment against an insurance company for the amount of a policy will not be reversed because the policy covered only the company's proportionate share of concurrent insurance, in different amounts, upon the several classes of property connected with a manufacturing plant, and the plaintiff failed to show the loss on each of the several classes, if it appears from the undisputed evidence that the loss was total, and was only partially covered by insurance; especially if defendant's attorney had ample opportunity below to elicit the information from plaintiff's witnesses, and made no effort to do so.

Error to Wayne; Carpenter, J. Submitted October 25, 1899. Decided December 12, 1899.

Assumpsit by the Improved-Match Company against the Michigan Mutual Fire Insurance Company on a policy of insurance. From a judgment for plaintiff, defendant brings error. Affirmed.

Bacon & Palmer, for appellant.

George Gartner, for appellee.

LONG, J. September 17, 1895, one W. A. Haines, acting as the agent of the defendant company, applied to the plaintiff to issue insurance to it for the amount of \$1,500 on its mill property, machinery, etc., situate in the city of Detroit. The defendant company's office was in the city of Lansing. The application was made out by Haines, but not signed by the plaintiff or any of its servants or agents. In the margin of the application appeared the following indorsement:

"Brokers or solicitors: Please answer the following questions:

"Have you personally inspected this risk?

"A. Yes.

"Is this property profitable to the assured?

"A. Yes.

"Can you recommend this risk as free from any moral hazard, or anything which would make it undesirable?

"A. Yes."

This application, signed by Mr. Haines, was forwarded to the defendant company by Mr. Haines. The defendant company thereafter issued its policy of insurance, dated October 20, 1895, and sent the same forward to Mr. Haines, who delivered it to the plaintiff some time between November 10th and 15th following. The building, machinery, etc., were insured in other companies, and the policy in the present case had indorsed upon it, "Other concurrent insurance permitted." The premium was not paid at the time of the delivery of the policy to the plaintiff, but it appears that Mr. Haines gave the plaintiff 30 days in which to pay it. The property was totally destroyed by fire on November 16, 1895. This suit is brought to recover the amount stipulated in the policy.

The defendant, with its plea of the general issue, gave notice:

1. That the property insured by the policy was a manufacturing establishment, and was operated at night later than 10 o'clock, without the consent of the defendant, and that the fire mentioned in the declaration occurred later than 10 o'clock at night, while being so operated, and that, therefore, the policy is void.

2. That the premium on said policy was never paid by, or on behalf of, said assured.

3. That said policy was not delivered to, and accepted by, the assured until after the fire occurred.

4. That no statement or proof of loss under said policy had been made out and served upon said defendant prior to commencement of suit.

The case was tried before a jury, which returned a verdict for plaintiff for the amount of its claim on the policy.

The first question discussed by counsel for defendant in their brief relates to the manner in which the suit was

commenced, and a claim that the court below had no jurisdiction. It appears that a summons was issued out of the Wayne circuit court on October 21, 1896, and returnable on November 3d. This summons was returned not served, and on November 10th an *alias* summons was issued, returnable December 1st. A showing was made by affidavit to the court that defendant had an agent in Detroit who received and delivered policies, and that affiant had good reason to believe he was the agent of defendant for the purpose of receiving or accepting service of process for defendant. On this showing the court made an order that the *alias* summons, with copy of affidavit, be served on such agent, and a copy be mailed to the defendant at Lansing, and that the same should stand as a valid service of the *alias* summons. Motion was then made by the defendant to quash the summons and service. This motion was overruled, when defendant applied to this court for a *mandamus* to compel the court below to vacate that order. This petition for *mandamus* was denied, on the ground that the remedy was by writ of error. *Michigan Mut. Fire Ins. Co. v. Wayne Circuit Judge*, 112 Mich. 270. Defendant thereupon pleaded the general issue, and went to trial upon the merits.

1. It is now contended by counsel for plaintiff that by thus pleading to the merits, and going to trial thereunder, the defendant waived the question of due personal service of the writ by which the cause was commenced. That question is expressly ruled by *Manhard v. Schott*, 37 Mich. 234, and the cases there cited, in which it was held that pleading to the merits brings one into court, whether lawfully served with process or not, and that he cannot afterwards object to the manner in which he was brought in. Counsel for defendant, however, cite, to sustain their claim, the case of *Warren v. Crane*, 50 Mich. 300. But that case was distinguished in *Dailey v. Kennedy*, 64 Mich. 208, from the case of *Manhard v. Schott*, *supra*; and in *Durrell v. Richardson*, 119 Mich. 592, the same distinction was made, and the claim that no waiver took

place by pleading to the merits and going to trial was limited to cases in which the party is deprived of his liberty. The position taken by the defendant cannot, therefore, be sustained. The parties were properly before the court when the plea of the general issue was filed, and the court had jurisdiction to hear and determine the case.

2. It is contended that Mr. Haines was not the agent of the defendant company, and had no power to waive any of the conditions in the policy, but that he was a mere broker, and acted for the plaintiff in procuring the insurance. This point does not appear to have been made in the court below; but, if it had been, the question is clearly placed at rest by the testimony of Mr. Haines, as follows:

“I received other policies from this company, and delivered them, and collected premiums, and forwarded the premiums, less my commission, to the company. Mr. Garner is the manager of the defendant company, with his headquarters at Lansing, and it was through him that I negotiated the policies. I had a conversation with him prior to the 20th of October, 1895, in reference to my acting for the company. He said to me that he would write policies for me, if acceptable, and allow me a commission, and I placed other policies besides the one in question for the company, probably 15 or 20. I received the policies, delivered them, and collected the premiums, and forwarded them on. In the conversation I had with Mr. Garner, he said that 30 days would be allowed on payment of the premium. In transacting my business, it was done by soliciting insurance. I went to the Improved-Match Company's place of business to see about procuring insurance several times. I knew of their getting some policies through other agents besides myself. My business there was to see whether I could write some insurance for them; and that was the only business I had.”

Under these circumstances, it appears conclusively that Haines was the agent of the defendant company, and not of the plaintiff. *Russell v. Insurance Co.*, 80 Mich. 412; *Kausal v. Insurance Ass'n*, 31 Minn. 20 (47 Am. Rep. 776). The rule in such a case and the reason for it is fully stated in *Russell v. Insurance Co.*, *supra*, by a

quotation from the opinion of Mr. Justice Mitchell in *Kausal v. Insurance Ass'n.*

3. Counsel for the defendant asked the court to charge the jury as follows:

"It appears from the undisputed facts in this case that the property insured was a manufacturing plant operated during the night-time, and burned while being so operated in the night; and, no written permit to operate the plant during the night being attached to or indorsed on the policy, the policy is void, and your verdict will be for the defendant."

This request was refused, and the court charged the jury on that question as follows:

"As to the knowledge of the agent that the Improved-Match Company was operating its factory at night, you have heard the testimony concerning that. The policy itself contains this language: 'This entire policy, unless otherwise provided by agreement, shall be void if the insured now has, or shall hereafter make or procure, any other contract of insurance, or if the subject of insurance be a manufacturing establishment, and it be operated, in whole or in part, at night later than 10 o'clock.' Now, the testimony in this case shows that this establishment was operated at night, and the loss actually occurred at 3 or 4 o'clock in the morning. I charge you, however, as I have already indicated, that if, at the time this policy was delivered by the agent of the insurance company, he knew that the manufactory was being operated at night, * * * the company is estopped from making this claim; that is to say, the company, under such circumstances as that, must be assumed to have that knowledge, and to make the insurance with it. So that, in disposing of that question, the simple thing for you to determine is whether or not the agent had the knowledge at the time he delivered that policy. If he did, then the policy is valid; * * * if he did not, the policy is void."

Error is assigned on this charge. It appears that the policy, while being dated October 20th, was not delivered until some time later. Mr. Anderson, one of the directors of the plaintiff company, testified that the policy was not delivered until some time from the 10th to the 15th of

November; that, at the time he took the policy, he told Mr. Haines they were operating the plant night and day. He also testified that they started the plant the last week in October, but he could not state the exact date. He was then asked, on cross-examination: "It was after you had the talk with Mr. Haines about this policy? A. Not with the clause in regard to running nights." It is therefore apparent that the claim of the plaintiff was that the factory was running night and day when this talk was had with Mr. Haines, and that Haines knew it was so running when the policy was delivered. There is some testimony tending to support that claim.

The policy contained the clause referred to by the trial court in its charge, and also provides:

"No officer, agent, or other representative of this company shall have power to waive any provision or condition of this policy, except such as, by the terms of this policy, may be the subject of agreement indorsed hereon or added hereto, and, as to such provisions and conditions, no officer, agent, or representative shall have such power, or be deemed or held to have waived such provisions or conditions, unless such waiver, if any, shall be written upon or attached hereto; nor shall any privilege or permission affecting the insurance under this policy exist or be claimed by the insured unless so written or attached."

It is contended by counsel for defendant that the fact that the plaintiff company, at the time it was negotiating for this insurance, and while it was building a plant, stated to the agent that it intended to run nights after it got in operation, would not be such notice or knowledge on the part of the agent as would operate as a waiver of this clause by the defendant company. Counsel cite, in support of this contention, *Hartford Fire Ins. Co. v. Davenport*, 37 Mich. 609, and other cases. In the *Davenport Case* it appeared that the policy contained a clause of forfeiture for vacancy of the premises, and that the insured, before taking the policy, told the agent of the insurance company that he expected to leave his house vacant for a year or more, and was informed by the agent

that it would make no difference. During the vacancy the house was burned. The court said :

“In this case, the vacancy concerning which the parties conversed, if there was any such conversation, was one contemplated in the future, and the stipulation or understanding, if it amounted to anything, was an executory contract, intended to form a part of the contract of insurance. This being so, the doctrine cannot be admitted that any part of the completed contract can rest in parol. The policy was the conclusion of the bargain, and its acceptance would exclude any parol promises inconsistent with it. There is no resemblance between a parol variance of a written contract and a waiver of a condition after it has become binding on the parties.”

That is not the claim made here by the plaintiff. It is not contended that, had the factory not been running nights at the time the policy was delivered, the agent could permit this to be done, or that he could, under such circumstances, have waived this condition in the policy; but it is contended that when the policy was delivered, and in fact before it was delivered, the agent knew that the factory was running nights, and assented to it, and thereby waived the condition. It was not a promise which contemplated future action in that regard, but the delivery of a policy under conditions then existing. It was a fact then known by the agent of the company, and consequently then known by the company itself. Therefore the right to run beyond 10 o'clock at night was a part of the contract itself, those conditions in the policy to the contrary having been waived by Mr. Haines, as agent of the company. The knowledge of the agent is regarded as the knowledge of the company. *Gristock v. Insurance Co.*, 84 Mich. 166; *O'Brien v. Insurance Co.*, 52 Mich. 131; *Copeland v. Insurance Co.*, 77 Mich. 560 (18 Am. St. Rep. 414); *Russell v. Insurance Co.*, 80 Mich. 412; *Steele v. Insurance Co.*, 93 Mich. 84 (18 L. R. A. 85); *Peoria Marine & Fire Ins. Co. v. Hall*, 12 Mich. 202. The court was not in error in refusing this request nor in the charge as given.

4. Counsel for defendant contend that the court should have directed the verdict in favor of the defendant because of the failure of the plaintiff to make and serve proofs of loss. It appears that, after the fire, the plaintiff wrote the defendant about it, and that it was a total loss. The defendant company immediately answered that it had canceled the policy, and called attention to stipulations in the policy in reference to running after 10 o'clock at night, and added: "I am informed that your establishment burned at about 3 o'clock in the morning, and while it was being operated." This was virtually a denial of liability, and no proofs of loss were necessary to be made; but, if any contention could arise over the meaning of this letter, it has been settled by the verdict. The question was submitted to the jury whether there had been a denial of liability by the defendant company.

5. Counsel for defendant asked the court to direct the jury that there was no evidence by which they could find the amount of the loss sustained by the plaintiff upon each item of property insured. This was refused, and, we think, very properly. The policy states:

"\$1,500—Being 15-140 of the following specific and concurrent insurance, divided to apply as follows:

"\$7,000—On their three-story brick, gravel-roof building, including foundations, elevator, steam and water pipes, heating pipes, and all permanent fixtures attached thereto, situated on the west side of Bellevue avenue, between Kirby avenue and Frederick street, Detroit, Mich.

"\$6,000—On their fixed and movable machinery of all kinds, with their spare parts and attachments, shafting, gearing, belting, hangers, pulleys, tools, trucks, cases, tables, boxes, electric-light wiring and fixtures, pails, hose, and other apparatus used in their business that is not included with building or otherwise specified.

"\$1,000—On their boiler and engine, and their connections, valves, steam and water pipes, hose, pump, and Huyett & Smith's heater and fan, while contained in their brick boiler and engine rooms attached to the above-described building."

Under the strict rule of law, it was the duty of the

plaintiff to show the amount of loss upon each class of property insured. This might easily have been shown, and was undoubtedly an oversight on the part of the attorney for the plaintiff. In view, however, of the small amount of the insurance, and the undisputed evidence of the amount of the loss, which was total, and the estimate placed upon their values by the defendant's agent in the application, we do not think it can be said that there was no evidence of the amount of the loss upon each class of property. We the more readily reach this conclusion because the attorneys for the defendant might easily upon the trial have cross-examined the witness as to the value of the various articles of property destroyed and the loss thereon. They, however, chose to rest content with the proof, and raised the question afterwards only by request to charge. Under these circumstances, we do not think the judgment should be reversed.

Judgment is affirmed.

The other Justices concurred.

SCOFIELD *v.* HAIRE.

1. PARTITION FENCE—INCLOSURE.

On a bill to set aside the findings of fence viewers requiring complainant to contribute towards a partition fence on the north and east lines of her property, it appeared that a fence of some kind had been maintained on those lines for some time prior to the action of the fence viewers, but that the fences along the highways on her west and south lines had been taken down eight years before. *Held*, that complainant's land was an "inclosure," within the meaning of 1 Comp. Laws 1897, chap. 83, relating to the maintenance of partition fences between adjoining inclosures.

2. SAME—APPORTIONMENT OF COST—NOTICE OF HEARING.

One who is given no notice of a meeting of fence viewers to

determine the amount he should pay towards the cost of a partition fence is not entitled for that reason to have the entire proceedings, if otherwise regular, set aside, but is sufficiently protected if a new meeting is appointed to determine the amount to be paid by him, and he is given an opportunity to be present at that meeting.

Appeal from Lenawee; Chester, J. Submitted October 25, 1899. Decided December 12, 1899.

Bill by Laura L. Scofield against Albert Haire, H. Blinn Tallman, and Freeman H. Gove to set aside certain proceedings of defendants as fence viewers of the township of Tecumseh. From the decree rendered, complainant appeals. Affirmed.

W. J. Ingersoll, for complainant.

Wightman & Gillespie, for defendants.

LONG, J. This bill was filed to set aside and cancel the proceedings of the defendants, as fence viewers of Tecumseh township, in Lenawee county, for the following reasons:

1. That the defendants, as fence viewers, had no jurisdiction to apportion the partition fence, and require the building thereof by complainant, as, at the time the action was taken by them, the lands of neither the complainant nor of Mr. Henry (who made the petition to the fence viewers) were inclosed with exterior fences, and consequently the proceeding did not come within the provisions of 1 Comp. Laws 1897, chap. 83.

2. That said partition fence, when built, would not complete the inclosing of complainant's or Mr. Henry's land.

3. That the finding of the defendants, as fence viewers, does not show that they found the said lands to be inclosed lands.

4. That complainant had no notice of the meeting of the defendants as fence viewers, and did not attend the same, and hence was deprived of her day in court.

An answer was filed, and the case heard in open court, and the court filed a written opinion, as follows:

"I think the evidence and pleadings in this case fairly show that the complainant, Laura L. Scofield, has a life interest in the twenty and one-half acres in the southwest part of the west half of the southwest quarter of section twenty-nine, at least in the southwest part of the quarter section where the farm of Samuel L. Henry lies; that these pieces of land were used as farms, and had been for years; that there was a fence starting at the point 'E' on the map that has been introduced in evidence, and marked 'Exhibit 1,' running thence east, and thence south, to 'D,' in the east and west highway, or the highway that runs in an easterly and westerly direction; that the line fence remained there until in December prior to the calling of the fence viewers; that that fence, in whatever condition it was, remained there until December; that about eight years ago the road fence around this twenty and one-half acres was taken down; that the farm of Mr. Henry is inclosed with line fences on the east to the north road fence, on the south, and the road fence on the west, excepting about twenty rods, just north of the land owned by this complainant. I think that any fair construction of the proof in this case shows that these were farms, occupied as such, and were so inclosed, and continued so, within the law, until this application was made to the fence viewers. I think this twenty and a half acres was such an inclosure as comes within the statute that permits the calling of the fence viewers to divide a line fence. * * * I think the fence viewers in this case had jurisdiction to act and to partition this line fence.

"That brings us to the other question, where the courts have held that you cannot take a person's property from him unless you give him an opportunity to have his day in court. As I understand the statute, Mrs. Scofield should have been notified of the meeting of the fence viewers to determine what expense she is liable for, and has a right to be heard upon what amount shall be determined against her, and she should be notified, so that she can appear there at that time,—at the time the fence viewers meet. It is conceded here, or, at least, the evidence so shows, that there was no notice served upon her, and she had no knowledge of the meeting, and she has never had an opportunity to be heard in court, or before any court that has authority to determine the amount, if any, she should pay. That being true, I think the finding of the fence viewers of the amount she should pay

(§46.12) is void. I do not think the proceedings up to that time were void.

“With these views, gentlemen, the court holds that the fence viewers had authority to act, but they had no authority to make that apportionment until they had notified the complainant, and until she had an opportunity to appear before them and be heard. An injunction may issue restraining them from certifying this amount to the supervisor. But they should be permitted to notify her, and set another day for hearing, and allow her to appear before them, if she desires to be heard upon the amount that shall be determined to assess against her premises.”

The jurisdiction of a court of equity to hear and determine this case is not questioned by counsel, and therefore we shall dispose of the case upon its merits.

We think the court was right in finding that the lands were “inclosed,” within the meaning of the statute.

It appears that the complainant was notified of the first meeting of the fence viewers. She appeared, and protested against the proceedings, on the ground that the premises were not inclosed with exterior fences. This was on February 12, 1898. On the 21st day of June following, the fence viewers met again, and made the following finding:

“We, the undersigned, two of the fence viewers of the township of Tecumseh, in the county of Lenawee, having heretofore, on complaint of Samuel L. Henry, examined that portion of the partition fence between the land occupied by said Samuel L. Henry and Laura Scofield, respectively, in said township, and having determined the same to be out of repair and to require building, and having certified the same to the said Laura Scofield on the 12th day of February, 1898, and directing her to rebuild the same within ninety days from that date, and she, the said Laura Scofield, having neglected so to do, and the said Samuel L. Henry having, since the expiration of said last-mentioned time, rebuilt the same, we do, upon inspection thereof, adjudge the said fence so rebuilt as aforesaid to be sufficient, and we do hereby certify that we have ascertained the value of such rebuilding by said Samuel L. Henry to be the sum of forty-six and 12-100 dollars, and

that our fees for services in the premises amount to two dollars.

"Given under our hands this 21st day of June, A. D. 1898.

"ALBERT HAIRE,
"FREEMAN H. GOVE,
"H. B. TALLMAN,
"Fence Viewers."

The court below finds that no notice was given to complainant of this meeting of the fence viewers, and hence found that that finding was void. The record sustains this finding, and there was no error in the conclusion reached. The complainant was entitled to be heard on the question of the amount which Henry was entitled to receive.

The decree below must be affirmed.

The other Justices concurred.

LAWRENCE v. MORSE.

1. HOMESTEAD—TENANT IN COMMON.

A tenant in common may have the benefit of a homestead in the lands held in common.

2. SAME—OCCUPANCY.

Occupancy sufficient to support a claim of homestead as against an execution creditor is established by the claimant's moving household goods to the premises as soon as he becomes vested with the title, and by his sleeping there nights, and taking his breakfasts and his suppers there, although his wife and family were living on other premises owned by her at the time of the levy.

Appeal from Oakland; Smith, J. Submitted October 25, 1899. Decided December 12, 1899.

Bill by Francis P. Lawrence and Phoebe D. Lawrence against George C. Morse and John K. Judd to quiet title. From a decree for complainants, defendants appeal. Affirmed.

A. & S. H. Perry, for complainants.

George W. Radford, for defendants.

LONG, J. This bill was filed in the Oakland circuit court, in chancery, to set aside a levy and execution sale and to quiet the complainants' title to one village lot in the village of Oxford, which complainant Francis P. Lawrence claims as a homestead, and which it is conceded is of less value than \$1,500. The cause was heard in open court, and a decree rendered below in favor of complainants. Defendants appeal.

It appears that one Minerva Green, an aunt of complainant Francis P. Lawrence, died on May 7, 1898, leaving a will, by which she devised to him and to his sister each an undivided half of the house and lot in question. His wife, Phoebe D. Lawrence, at that time owned a farm, upon which the complainants lived. She seems to have had the management of her own farm. Immediately after the death of Mrs. Green, Francis P. Lawrence moved a quantity of household goods into the house on the lot in Oxford, and stayed in the house nights, his wife continuing to occupy the home farm up to February following, when she, having rented the farm, went to live and make it her home with her husband, in the house in the village. It is the claim of the complainants that when they learned, the year before Mrs. Green's death, that she intended to give Francis P. the one-half interest in the house, they intended to move into it, and occupy it as a homestead. The testimony on the part of the complainants tended to show that there was an arrangement between the complainants, both before and after Mrs. Green's death, that the premises in controversy should be their homestead, and it is also claimed that Mr. Lawrence had

made an arrangement with his sister to purchase her interest in the property. This levy was made on May 17th, 10 days after Mrs. Green's death, and while the wife remained on the farm. The court below, in deciding the case, said:

"The only question involved is whether complainant Lawrence may have a homestead in the land sold upon execution, in which he was a tenant in common with his sister. Counsel for defendants relies upon the case of *Amphlett v. Hibbard*, 29 Mich. 298. But this case is fairly in conflict with and overruled by the later cases of *King v. Welborn*, 83 Mich. 195 (9 L. R. A. 803), *Sherrid v. Southwick*, 43 Mich. 515, and *Lozo v. Sutherland*, 38 Mich. 168. The only question about which I am in doubt is the one growing out of the facts. Mrs. Lawrence owns a farm, upon which her husband and family have resided with her. She testified, in substance, that her home was on this farm when the bill was filed; that, after Mrs. Green's death, her husband occupied this farm same as before Mrs. Green's death, except that he went to the village, and stayed overnight; that, the same day Mrs. Green died, Mr. Lawrence said, 'We will move to the village on this land, and make it a home.' Mr. Lawrence states, in substance, 'I took breakfast and supper in the house on this land, staying there overnight, but was not separated from my wife.' My belief from the evidence is that the necessity of providing a home for this family does not call for the exemption of this village property; that, were there no debts against him, he would not think of leaving the wife's farm; and that his prompt occupancy of the village property was upon advice, for the express purpose of avoiding its application towards payment of the debt by being in a position to claim it as a homestead. But, notwithstanding this, I think the homestead decisions are liberal and broad enough to give him the exemption."

It is undoubtedly well settled in this State that a tenant in common may have the benefit of a homestead in lands held in common. *King v. Welborn*, 83 Mich. 195 (9 L. R. A. 803), and cases there cited. This proposition is conceded by counsel for defendants; but he contends that no one can claim a homestead in property which is not occupied by him and his family, and that the mere fact

that Mr. Lawrence slept in the house nights, while his wife and family remained on the farm, was not sufficient occupancy to constitute this property a homestead.

We think the findings of fact by the court below are fully sustained by the evidence, and the court very properly reached the conclusion that the parties were entitled to the homestead right claimed. The case is unlike *Bowles v. Hoard*, 71 Mich. 155. In that case there was no actual occupancy when the levy was made. The conclusion there reached was that the subsequent occupancy was with the purpose of defeating the levy, the lien having accrued on the premises before there was an actual or potential occupancy. In the present case the complainant occupied the premises from the very day the title vested in him. There was no fraud in his doing this unless it be a fraud in any case to claim a homestead right as against an execution creditor. This is certainly not the policy of the law. If a debtor is justified in claiming a homestead as against his creditors, it must follow that he is justified in establishing such right by occupancy.

The decree must be affirmed, with costs.

The other Justices concurred.

THRONE v. MEAD.

SHEEP-KILLING DOG—RIGHT TO SHOOT.

Where the owner of sheep is informed that a sheep-killing dog, which has previously worried sheep belonging to him, is within his inclosure, unaccompanied by its owner or other person, he is justified in having his informer shoot the dog, without waiting to see if it is again going to chase his sheep.

Error to Hillsdale; Chester, J. Submitted October 26, 1899. Decided December 12, 1899.

Case by Lewis Throne against Dennis Mead for killing plaintiff's dog. From a judgment for plaintiff, defendant brings error. Reversed.

Sampson & Barre, for appellant.

W. D. Fast and *A. L. Guernsey*, for appellee.

MOORE, J. August 11, 1897, John Barger, at the request of the defendant, shot two dogs, one of which belonged to the plaintiff. Suit was brought by plaintiff against the defendant. From a judgment obtained by him, the defendant has appealed.

The record discloses that plaintiff was the owner of a spayed bitch dog, about 4 years old, which, he testified, he kept chiefly for hunting minks and coons. He says he kept her tied up nights, and a good deal of the time in the daytime. He testified he never knew she worried or killed any sheep. It was shown by some of the witnesses for the plaintiff that the dog was frequently away from home, and among flocks of sheep. One of them testified that, previous to the shooting of the dogs, he had seen them chasing sheep belonging to the defendant. He saw the dog which was shot grab a buck belonging to Mr. Jackson, and soon thereafter the sheep was found dead. It

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was shown on the part of the defense that, shortly before the two dogs were killed, they killed a buck and several lambs belonging to Mr. Jackson, whose farm adjoined the farm of Mr. Mead, and in July they chased the sheep of Mr. Parker, another neighbor, who drove them away. The defendant had a flock of lambs he had weaned, which he kept west of his house. He saw the dog belonging to the plaintiff chasing these lambs the first week in August, and got his gun to shoot her, but she got away before he could do so. Before the dogs were killed, the defendant had been told about their killing the buck and lambs belonging to Mr. Jackson. On the morning the dogs were killed, their owners were not with them. The defendant did not see the dogs until after they were killed, but his attention was called to the fact that they were on his premises, by Mr. Barger; and when he got the gun he knew it was for the purpose of shooting the dog that had chased his sheep, and killed the sheep belonging to Jackson.

It is claimed by counsel for plaintiff that as the dogs had not done, or threatened to do, any damage to defendant's sheep on the day when they were shot, he had no right to kill them; citing *Bowers v. Horen*, 93 Mich. 420 (17 L. R. A. 773, 32 Am. St. Rep. 513). An inspection of the case will show it is not in point. If the defendant had shot the dog when he saw her chasing his lambs the week before, he would have acted strictly within the provisions of the statute (2 Comp. Laws 1897, § 5592). Had Mr. Mead notified the plaintiff in writing of what his dog had done to the lambs in August, it would have been his duty to have had the dog killed within 48 hours, and he would have subjected himself to a penalty for a failure to do so. This would have been equally true if Mr. Jackson or Mr. Parker had given him a like notice of what the dog had done to their sheep. The statute does not regard with much favor a sheep-killing dog. When the owner of sheep sees a pair of sheep-killing dogs in his inclosure, unaccompanied by any person, and has caught one of them, a few days before, chasing his lambs, he is

not obliged to wait until they have again begun their cruel work, before he can take effective measures to protect his property. Under the undisputed facts in the case, a verdict should have been directed for defendant. See *Hubbard v. Preston*, 90 Mich. 221 (15 L. R. A. 249, 30 Am. St. Rep. 426).

Judgment is reversed, and no new trial given.

The other Justices concurred.

HOLMES v. DEPERT.

1. LOST DEED—PROOF OF CONTENTS—WITNESSES—CIRCUMSTANCES AFFECTING CREDIBILITY.

The fact that a defendant, in attempting to give the substance of a deed claimed to have been drawn by him and subsequently lost, indicated at first an insufficient description, but corrected his testimony, upon being recalled, so as to denote that the property was properly described, is no ground for disturbing a judgment based upon the existence of the deed; the circumstance, if suspicious, being for the jury to consider.

2. SAME.

In proving the contents of a lost instrument, it is sufficient to prove its substance.

3. SAME—CONCLUSIONS OF WITNESS.

In proving the contents of a lost deed, witnesses must give the words or the substance of the words; they cannot be asked the "sense" of the deed.

4. REAL PROPERTY—POSSESSION—CONSTRUCTIVE NOTICE.

Actual possession of land is constructive notice to purchasers of a claim thereto.

Error to Wayne; Frazer, J. Submitted October 26, 1899. Decided December 12, 1899.

Ejectment by Henry G. Holmes against Eva Deppert and others. From a judgment for defendants, plaintiff brings error. Reversed.

George H. Prentis, for appellant.

C. J. O'Flynn, for appellees.

HOOKEE, J. The plaintiff brought ejectment, and appeals from an adverse verdict. The court left two questions to the jury, viz., whether the widow had a life estate in the premises, and whether the land described in the declaration was susceptible of location. The plaintiff claims that a verdict should have been directed in his favor. The declaration describes the land claimed as the undivided one-fifth of that part of the "Lambert-Beaubien Farm," so called,—

"Described as follows, and being all the land and premises between Illinois street on the south and Leland street on the north, and between Beaubien street on the east and the alley about one hundred feet west from the westerly line of Beaubien street, and being designated on the map of the city of Detroit as lots one hundred and three, one hundred and four, one hundred and five, one hundred and six, one hundred and seven, one hundred and eight, and one hundred and nine, and being known and described as lots one hundred and three, one hundred and four, one hundred and five, one hundred and six, one hundred and seven, one hundred and eight, and one hundred and nine of Miller and Wilcox's subdivision of outlots one hundred and eighty, one hundred and eighty-two, and one hundred and eighty-four of the 'Lambert-Beaubien Farm,' so called, or as lots one hundred and three, one hundred and four, one hundred and five, one hundred and six, one hundred and seven, one hundred and eight, and one hundred and nine of Miller and Wilcox's subdivision of outlots one hundred and eighty-two and one hundred and eighty-four of the Lambert-Beaubien farm."

Plaintiff introduced a deed from Eben Wilcox and wife and Alexander Adams to John Deppert, dated July 21, 1868, conveying lots 103, 104, 105, 106, 107, 108, and 109 of the Miller and Wilcox subdivision of outlots 180 and 182

of the Lambert-Beaubien farm, according to the recorded plat, being on the westerly side of Beaubien, between Illinois and Seward streets; also a deed from Daniel Hand to John Deppert, dated September 18, 1875, conveying lots 103, 104, 105, 106, 107, 108, and 109 of Miller and Wilcox's subdivision of outlot numbered 184 of the Lambert-Beaubien farm. It was admitted that John Deppert was the owner of the premises described in the foregoing deeds at the time of his death, and that he was the husband of Eva Deppert, and the father of the other defendants. A plat was introduced, showing the division of the farm into outlots, including 180, 182, and 184. A deed was introduced from the sheriff of Wayne county to the plaintiff, dated November 7, 1894, conveying John J. Deppert's interest in lots 103, 104, 105, 106, 107, 108, and 109 of Miller and Wilcox's subdivision of outlots 180, 182, and 184 of the Lambert-Beaubien farm, according to the recorded plat thereof. The plaintiff also showed that the defendants were in possession of the premises described in the declaration, and this was not disputed. The defendants called several witnesses to prove that the children united in a deed to their mother of all of this property left by John Deppert, consisting of seven lots, and that she had been in possession of them thereafter. Counsel for the defendants also introduced two plats showing Beaubien, Illinois, and Seward streets, among others. According to one of them, the lots between Illinois and Seward streets were numbered from 108 to 114, inclusive; according to the other, from 103 to 109, inclusive. These plats contain nothing to show what plats they are, but, assuming them to relate to the same locality, another plat, offered by the plaintiff, indicates that the land between Seward and Illinois streets is upon what was platted as outlot 184. Further light was thrown upon the subject of the location of the premises by the testimony of Campau, a surveyor, which showed that the numbering of some of the lots had been changed by the later plat. He also testified that Leland and Seward streets were identical. As all of the

testimony was returned, and the foregoing is all there was of it, we have no difficulty in finding that the declaration sufficiently describes the land which the evidence shows that John Deppert owned, and which these defendants occupy, and the court might safely have told the jury so; and, inasmuch as counsel requested that the jury be instructed that the plaintiff should recover unless a conveyance was made to the widow, we think the jury should not have been allowed to consider the question of description.

Another important question relates to the alleged deed to the widow. If it is true that the heirs united in a valid deed to the widow, it is manifest that the plaintiff should not have recovered, because not entitled to the possession. The alleged deed was not produced, and there was testimony that it was lost. This authorized the reception of proof of its contents; and, after stating the circumstances under which it was said to have been made, several witnesses attempted to give the substance of its contents. It is claimed on the part of the plaintiff that some of this evidence was inadmissible, and that in the aggregate it fell short of proving a valid conveyance. John J. Deppert testified that the deed was agreed upon, and he was to prepare it, which he did, and that all signed it, and it was delivered to the widow. On cross-examination he said it was not witnessed, nor was it acknowledged. On being recalled, he said that he could not give the contents word for word, but that he "kind of copied an old deed,—followed that up a little bit." The testimony proceeds as follows:

"Q. What was the language?

"A. 'This indenture,' made such and such a date. 'We hereby sell, assign, and dispose to Mrs. Eva Deppert, our mother, this property in dispute on Beaubien street, for one dollar and other considerations, for as long as she lives.' There is about the substance of the words; pretty close to it; I can't say exactly."

And the witness, being again recalled, February 8th,

was asked on cross-examination to write, as near as he could, a copy of the paper, and he thereupon wrote the following in open court, which is marked "Exhibit A," having left the stand for such purpose:

"This is to certify that we, the undersigned, hereby sell and assign to our mother, Mrs. Eva Deppert, all our right, title, interest in and to all of our father's estate, John Deppert, deceased; said property being situated on the west side of Beaubien street, between Leland and Illinois streets. [Seal.]" (Signed.)

On cross-examination Catherine Deppert said:

"It said that the property was— As long as my mother lived, she had the right of that property. She had the use of it as long as she lived. We all left it to her; all the children."

And, on re-examination of the witness, counsel for defendants asked the following questions:

"Q. You don't pretend to say that those were the exact words?"

"A. No, sir.

"Q. That was simply the sense of it?"

"A. That is the sense of it."

And counsel for plaintiff asked that the question and answer be stricken out, as he objected to the witness giving the sense of it, instead of the language; which motion was overruled by the court, and plaintiff duly excepted.

Christopher Deppert said:

"My brother John had a deed made out there, settling the right to my mother as long as she lived; and they all signed their names, and I signed my name, and my brother gave the paper to my mother, and my mother gave it to my sister Kate, and she put it in a box, and that was the last I heard of it."

On cross-examination he said that:

"My brother read the paper to us, and it read so as to give my mother the right of everything. I cannot state exactly the words. It read to the effect that everything was owned by my mother; that we were giving her the

legal right of everything as long as she lived, or something like that. I cannot give the exact language; I cannot say any more than I have said."

Elizabeth Blesser said:

"We thought it was no more than right that mother should have it as long as she lived, and my brother wrote out a paper, and we all signed it, to give mother the right of all the property—everything—as long as she lived; and, after we had all signed it, John gave it to mother, and mother gave it to my sister Kitty, and she put it away. I have never seen the paper since that."

On cross-examination she said she could not give the words, it was so long ago.

Mrs. Eva Deppert said:

"The paper said that everything belongs to mother as long as she is alive. After the paper was signed, John handed it to me, and I gave it to my daughter Kitty, who locked it up in a box, and I have not seen it since."

On cross-examination the witness said she could read English; that John read the paper to her, and that then she read it over before it was put away; that the paper said, "All what my husband and me was working—what we had—belonged to me as long as I am alive."

The testimony of John J. Deppert was sufficient to raise a question for the jury, so far as the proof of contents of the writing is concerned. It contained words of conveyance, and it sufficiently described the land, the parties, and the estate. Much of the testimony in relation to this subject fell short of proving the contents of a valid deed. The testimony first given by Deppert was not sufficient in the matter of description, but he subsequently made it so. This is claimed to be a suspicious circumstance, but, if so, the question was for the jury. In proving the contents of lost instruments, it is sufficient to prove the substance of the contents. It is not competent for the witness to give a conclusion as to the effect of the deed. He cannot be asked the sense of the deed. He should give the words or the substance of the words. The sense of the

words would be the substance, and this was what the witness attempted to give. The question is near the line, and we think that a trial court may properly be strict in confining testimony to the substance of contents, and preventing the introduction of conclusions.

There is no force in the claim that the plaintiff was a *bona fide* purchaser without notice, as the possession of Mrs. Depert was constructive notice.

Some other questions are raised, but we think it unnecessary to discuss them.

The judgment is reversed, and a new trial ordered.

The other Justices concurred.

PEOPLE v. BENNETT.

122 281
156 374

1. FORGERY — INFORMATION — TRANSLATION FROM FOREIGN LANGUAGE.

An information for uttering a forged note which gives a signature thereto in English, while the note was signed in German, should set out that the name was written in German, and give its English equivalent.

2. SAME—AMENDMENT.

Under the statute of amendments (8 Comp. Laws 1897, § 11922), an information for uttering a forged note which sets out the signature in English, when in fact the note was signed in German, of which the translation given is incorrect, may be amended to cure the defect.

3. SAME—PROMISSORY NOTE—PROVISION FOR ATTORNEY'S FEES.

An instrument promising to pay a stated sum, with interest, at a specified date, together with "10 per cent. attorney's fees for collecting same, to be included in any judgment on this note, without relief from valuation or appraisal laws," while not a promissory note, is subject to forgery at the common law; and an information for uttering such a forged instrument is not invalid because it is misnamed therein as a "promissory note."

4. SAME—EVIDENCE.

On a prosecution for uttering a forged agreement to pay money, admitted to have been signed by the purported makers, but claimed by them to have been altered by respondent before being uttered, it was error to permit the prosecution to go into the question of the consideration for the agreement, and to show respondent's default with respect thereto.

Exceptions before judgment from Allegan; Padgham, J. Submitted October 26, 1899. Decided December 12, 1899.

Erasmus Bennett was convicted of forgery. Reversed.

Rodgers, McDonald & Minor, for appellant.

Charles N. Thew, Prosecuting Attorney (*Fidus E. Fish*, of counsel), for the people.

MONTGOMERY, J. The respondent was convicted of uttering a forged note signed by 11 residents of Allegan county. The note set out in the information reads as follows:

"\$400.00. DORR, MICH., Sept. 16th, 1897.

"Three years after date, we, or either of us, promise to pay to E. Bennett and Son, or bearer, four hundred dollars (\$400.00), for value received, with 8 per cent. interest per annum from date until paid, and 10 per cent. attorney's fees for collecting same, to be included in any judgment on this note, without relief from valuation or appraisal laws. JULIUS REWA. JOHN SNYDER. FRED SNYDER. E. D. BARTZ. JOSEPH GETZEN. F. C. GILBERT. GUST GENTHER. MICHAEL BURCHARDT. JOHN BIEBER. KLEMP RODENHESLER. HENRY STEIN."

But three points are made which require discussion, as the remaining questions are subordinate ones, which will be sufficiently treated in dealing with the three following: (1) Was there a fatal variance between the instrument offered and the one set out? (2) Is the instrument set out a promissory note, within the meaning of the statute defining the instruments which are subject to forgery?

(3) Were the respondent's rights prejudiced by permitting proof of matter irrelevant to the issue, and tending to show that he may have been guilty of another offense, or at least of overreaching, in obtaining the note in question?

1. As appears by the instrument above set out, one Klemp Rodenhesler appears to be one of the signers. The information so charged. The name corresponding to his on the instrument introduced appears to have been written in German. One Clemens Rotenhesler was called as a witness, and shown to have been one of the signers of the note. No proof appears to have been offered that the German name attached to the note would, when properly translated, read as it was set out in the information. The practice was very loose. The information should have set out that the name was written in German, and have given its English equivalent. 9 Enc. Pl. & Prac. 574. Doubtless, under our statute of amendments (3 Comp. Laws 1897, § 11922), the information is in this respect subject to amendment. See *People v. Henssler*, 48 Mich. 49. But we refer to it, as the case must go back for retrial.

2. Is the instrument above set out a promissory note? Respondent's counsel contend that it is not, and cite *Cayuga Co. Nat. Bank v. Purdy*, 56 Mich. 6; *Second Nat. Bank v. Wheeler*, 75 Mich. 546; *Conrad Seipp Brewing Co. v. McKittrick*, 86 Mich. 191; *Altman v. Rittershofer*, 68 Mich. 287 (13 Am. St. Rep. 341). These cases must be deemed decisive of the question.

It is further contended, as this instrument is not a promissory note, and as the information counts on it as such, the case should be reversed and the respondent discharged. We do not think this result should follow. The instrument set out at length is such a one as is the subject of forgery at common law, and while the punishment is limited by section 11795, 3 Comp. Laws 1897, the information is not invalid by misnaming the instrument. *Harding v. State*, 54 Ind. 363; *People v. Kemp*, 76 Mich. 410.

3. The theory of the prosecution was that the instru-

ment in question had in fact been signed by the purported makers, but afterwards altered before being uttered. The prosecution was permitted to go into the question of the consideration of the agreement, and to show that other concurrent and similar agreements were given for a stallion, a pedigree, and accounts against farmers amounting to about \$400, and offered testimony to show that the respondent had promised to leave the pedigree with one Mr. Bartz, and had failed to do so. It is doubtful whether this question was saved by proper exceptions, but, as the case must go back for a new trial, we think it proper to state that, in our opinion, the dealings between the parties leading up to the giving of the note in question, and any default of respondent in respect of such agreement, should have been excluded, as it was, in effect, putting respondent on trial for another and distinct offense. *People v. Pinkerton*, 79 Mich. 110.

The conviction will be set aside, and a new trial ordered.

The other Justices concurred.

122	284
150	'330

PEOPLE v. SMITH.

1. RAPE—AGE OF CONSENT—FAILURE TO MAKE OUTCRY.

The crime of rape being established, under 3 Comp. Laws 1897, § 11489, by proof of intercourse with a girl under 16 years of age, it is immaterial that the girl made no outcry or resistance.

2. CRIMINAL LAW—TRIAL—LIMITING ARGUMENT.

Under Cir. Ct. Rule No. 24, subd. b, providing that counsel on either side shall be allowed at least a half hour in which to sum up the case to the jury, and that no more than two hours shall be allowed unless the court otherwise orders, the court has discretion to limit counsel in a criminal case to 35 minutes, and to stop them at the expiration of that time.

3. SAME—CHARACTER OF RESPONDENT—REPUTATION FOR TRUTH AND VERACITY.

A respondent is not entitled to present evidence sustaining his reputation for truth and veracity until the same has been attacked by the prosecution.

4. RAPE—INSTRUCTIONS—DENIAL OF GUILT.

The fact that the trial judge, in a prosecution for rape, failed to call the attention of the jury to the testimony of respondent, denying the charges of the complaining witness and of other witnesses, who testified that he had admitted the crime, while instructing them that the testimony of the latter witnesses, if believed, would tend strongly to establish respondent's guilt, does not warrant the reversal of a conviction, where no request for such instructions was preferred by his counsel. LONG and MOORE, JJ., dissenting.

Error to Montmorency; Kelley, J. Submitted October 26, 1899. Decided December 12, 1899.

Silas Smith was convicted of statutory rape, and sentenced to imprisonment for 10 years in the state prison at Marquette. Affirmed.

Respondent was convicted of the crime of rape, under section 11489, 3 Comp. Laws 1897. Absence of consent to sexual intercourse was not necessary; the girl, Carrie Frank, upon whom it was alleged the crime was committed, being under 16 years of age. She was 14 years and 11 months old at the time. Three errors are assigned:

1. The court erred in instructing the jury, "The law does not require that she should make any outcry or resistance, in order to constitute this crime."

2. The court stopped the counsel for the respondent in his argument at the end of 35 minutes.

3. The court did not charge the jury upon the respondent's theory, and consequently the respondent did not have a fair trial.

L. G. Daffoe, for appellant.

Horace M. Oren, Attorney General, and *Lewis W. Ostrander*, Prosecuting Attorney, for the people.

GRANT, C. J. (*after stating the facts*). 1. The first objection is untenable. The crime is complete, under the statute, whether the intercourse is had with force or by consent. In this case the proof is conclusive that the girl consented, unless it should have been found that she did not possess sufficient mind or intelligence to consent.

2. Cir. Ct. Rule No. 24, subd. *b*, provides that counsel upon either side of a case shall be allowed at least a half hour, if it is desired, and that no more than two hours shall be allowed, unless the court otherwise orders. Under this rule the time for argument rested in the discretion of the circuit judge, and we find nothing to indicate that this discretion was abused.

3. In deciding this question, a brief statement of the testimony may be necessary. Carrie Frank was the first witness. Her direct and cross-examination are given in narrative form. After she had been cross-examined at considerable length, the following colloquy took place:

"The Court: Mr. Francis, is this man Marshall here, the justice of the peace?

"Mr. Francis: Yes, your honor.

"The Court: You may have this witness stand aside. Let's see what he knows about it. I don't propose to be trifled with by this witness any more. I have extended indulgence here without any reason. This girl is not *non compos*, in my judgment. You may stand aside. Take a seat down there. Call your other witnesses, and especially that justice. I want to know how he came over there to see about this trouble."

Mr. Marshall was then sworn, and testified that he was a justice of the peace, that he was requested by the girl's sister to take her to her father's home, that he had previously heard the report of respondent's intercourse with the girl, and that he took the complaint. On cross-examination he testified that he had stated that the girl at first denied the intercourse, because "her folks told me she denied it in the first place, when they first talked to her about it." One Wellington, with whom respondent was boarding, testified that respondent told him he was going

over to his brother's to board, where this girl was, and for the express purpose of having intercourse with her, and that witness replied, "Mr. Smith, a man of your age ought to be thinking of something else besides trying to commit rape on a school-girl." Two other witnesses testified that respondent voluntarily stated that he had accomplished his object, and had had sexual intercourse with the girl. Opposed to this testimony was the denial of the respondent of his intercourse with the girl, and of the conversations with the other three witnesses.

The only objection that can be urged against the charge of the court is that it failed to call attention to the testimony of the respondent. It is not urged that the charge was erroneous. On the contrary, it was entirely proper that the court should call the attention of the jury to the position of the young girl, and to instruct them that, in weighing her testimony, they should take into consideration her condition, her circumstances of life, and her embarrassing position upon the witness stand, and all circumstances, in determining what credit they should give to her evidence. He also called the attention of the jury to the impeaching testimony introduced by the respondent, and instructed them to weigh it in the light of all the circumstances. It was his duty to instruct the jury in regard to the admissions, and to say to them that—

"If they were made voluntarily and intelligently, they are considered competent evidence, and oftentimes evidence which tends strongly to the establishment of the crime charged, if they are admitted and confessed deliberately, intelligently, and under such circumstances that the party was not laboring under any undue influence."

The circuit judge closed that part of his instructions by saying that it was the duty of the jury to weigh all the evidence, and determine from that whether the respondent was guilty. He then fully instructed them upon the presumption of innocence, and told them that they should not allow any prejudice or influence of sympathy or favor to weigh in determining the important question before them. He then said, in closing his instructions:

“You must take this evidence, and arrive at such a conclusion as meets the approval of your honest consciences, and determine this question, of the greatest importance to the respondent, and of the utmost importance to the people; and, when you have weighed this evidence, if your minds are in that condition that you can say that you believe him guilty to a moral certainty, beyond a reasonable doubt, it is your duty to convict, otherwise you must acquit.”

No fault can be found with this charge, unless it be the failure to call the attention of the jury to the denial of the respondent. He had able counsel to defend him, and no request or suggestion was made to the court by him upon this point. The respondent stood contradicted by four witnesses. Either he or they were guilty of perjury. There is nothing upon this record, except the statement of the circuit judge, to show that the girl was not of sound mind, and did not fully comprehend the nature of her oath. The statement made by the court would operate in the respondent's favor, rather than against him.

The prosecution had not attacked the reputation of the respondent for truth and veracity, and the evidence introduced in his behalf upon this point was incompetent, and, upon objection, might have been rejected. It was not error on the part of the court not to call the attention of the jury to this testimony. While the court might with propriety have said something to the jury about the defense, yet I do not think it was error for which the case should be reversed. Respondent had an able attorney to defend him; and I do not think it can be said that, under the charge, the jury were misled, or did not understand and fully consider the defense.

I think the conviction should be affirmed.

MONTGOMERY and HOOKER, JJ., concurred with GRANT, C. J.

LONG, J. (*dissenting*). Respondent was convicted under an information charging that on the 23d day of October, 1897, he—

“ With force and arms, in and upon one Carrie Frank, a female child under the age of sixteen years, to wit, of the age of fourteen years, eleven months, and twenty days, feloniously did make an assault, and her, the said Carrie Frank, then and there feloniously did unlawfully and carnally know and abuse.”

He was sentenced to 10 years' imprisonment in the state house of correction and branch of the state prison at Marquette.

Carrie Frank was called as a witness, and testified that at that time she lived with Winslow Smith, a brother of respondent; that on the night in question the respondent came to her room and had intercourse with her, while Winslow Smith and his wife were in a bed in the same room, and only a blanket between their bed and her own, and that that was the only time respondent came to her bed; that she said nothing about it to any one until a few days after, when a justice of the peace came to see her about it; that she at first denied it to him and to her mother and sister, but that finally she made the complaint upon which the warrant for the arrest of the respondent was issued. The justice was called, and testified that at first the girl denied the story, but afterwards admitted it, and that he thereupon issued the warrant. The prosecution also called one James Wellington as a witness, who testified that the respondent told him he was going to try to make connection with Carrie Frank, but witness could not state whether he meant married connection or not. Another witness for the prosecution testified that respondent told him that he had had connection with Carrie Frank on Saturday night, and again on Monday morning, in her room. Respondent was called as a witness in his own behalf, and denied that he had ever had intercourse with Carrie Frank. He also denied that he had ever stated that he was going to have connection with the girl, or that he had stated that he had had connection with her. The defense also called several witnesses who testified that the respondent's reputation for truth and veracity was good.

The county treasurer of the county testified that the general reputation of the witness James Wellington was bad. Mrs. Smith, the wife of respondent's brother, testified to the location and condition of the rooms upstairs where the girl slept, and stated that there was only a curtain between her bed and where the girl slept, and that respondent never went to the girl's room, to her knowledge.

It being made to appear to the court that respondent was unable to employ counsel, the court appointed counsel to defend him. At the close of the testimony the court limited the arguments of counsel to 35 minutes on a side, and, after counsel for respondent had spoken for that length of time, the court stopped him and would allow no further argument. Counsel took exception to this ruling. The first assignment of error is based upon this ruling. We think this was within the discretion of the trial court, under subdivision *b*, Cir. Ct. Rule No. 24.

We are satisfied, however, that the court was in error in the charge as given, and that under it the respondent did not have that fair and impartial trial which the Constitution provides,—not, however, in what the court said, but in what he omitted to say. After stating to the jury what would constitute the offense which respondent was charged with, he proceeded to detail the circumstances of the case, and what the people claimed, and then referred to the testimony of the girl, the testimony of the two witnesses as to admissions made by the respondent to them, and then said:

“Did he make such admissions? * * * Under what circumstances were they made? If they were made voluntarily and intelligently, they are considered competent evidence, and oftentimes evidence which tends strongly to the establishment of the crime charged. * * * These admissions you have a right to weigh.”

After going over the evidence introduced on the part of the people, the learned judge said further: “You must take this evidence, and arrive at such a conclusion as

meets the approval of your honest consciences." Nowhere in the charge did the court call the attention of the jury to the claims made by the respondent, or to any testimony introduced in his behalf. He was called in his own behalf, and denied emphatically the story told by the girl, and also denied that he had made the claimed confessions. While calling the attention of the jury to the story told by the girl, the court did not refer to the situation of the bed the girl occupied on that occasion,—that it was within a few feet of the bed occupied by Mrs. Smith, with only a blanket between the two beds; nor to the testimony of Mrs. Smith, who testified that the respondent did not come in there, to her knowledge. The charge is one which is easy to be made, and hard to be defended against. The circumstances under which the complaint was made were somewhat peculiar. The justice who took the complaint drove many miles, and into another county, for the purpose of interviewing the girl and having her make it. At first she denied the whole matter to him and to her mother, but finally, before the justice left, he had taken the complaint, and at once on his return issued the warrant. These were circumstances which might have a strong tendency to strengthen the testimony of the respondent and to weaken the testimony of the girl; and if the court was to dwell at length upon the people's evidence, which he did, then, in fairness to the respondent, such circumstances as were favorable to him and his theory of defense should have been given, and the attention of the jury called to the testimony given on behalf of respondent. It has many times been held by this court that even in civil cases a party to the case has the right to have his theory of the case submitted to the jury. *Wildey v. Crane*, 69 Mich. 17. We have not overlooked the fact that no requests to charge were tendered by counsel for the respondent; but counsel had the right to complain of the charge as given, notwithstanding that fact, for he presumably could not have known beforehand just how

the court would submit the case to the jury, or that the court would entirely ignore the respondent's claims.

The conviction should be reversed, and a new trial awarded.

MOORE, J., concurred with LONG, J.

PEOPLE *v.* YOUNGS.

122	292
127	32
122	292
881W	114

1. CRIMINAL LAW—ATTEMPTS.

To constitute an attempt, at common law, something more than an intention or purpose to commit crime is necessary; and this is not changed by the statute (3 Comp. Laws 1897, § 11784) prescribing a punishment for one who shall attempt to commit a crime, and in such attempt shall do any act towards the commission of the offense, but shall fail in the perpetration, or shall be intercepted or prevented in the execution, of the same.

2. SAME—ATTEMPT TO COMMIT BURGLARY—EVIDENCE.

One should not be convicted of an attempt to break and enter a dwelling upon evidence merely that he left his home, and met, by prearrangement, a supposed confederate at a saloon on the way to the dwelling, and after loading his revolver there, and procuring extra cartridges for it, went to a drug-store and bought chloroform, which, with carpet slippers and the weapon, was found on his person by the officers who arrested him as he came out of the store. GRANT, C. J., dissenting.

Error to Hillsdale; Chester, J. Submitted October 26, 1899. Decided December 12, 1899.

Clarence Youngs was convicted of an attempt to break and enter a dwelling, and sentenced to imprisonment for two years and six months in the state prison at Jackson. Reversed.

William C. Chadwick, for appellant.

William H. Frankhauser, Prosecuting Attorney, for the people.

MONTGOMERY, J. Two questions present themselves: (1) Does the statute in question change the common-law rule as to what constitutes an attempt to commit an offense? (2) If not, whether the facts stated show an attempt, as defined at the common law. In my opinion, both these questions should be answered in the negative. The statute, in terms, relates to attempts to commit a crime, and, to make the intent still more certain, provides that, before the offense shall be complete, the accused shall do some act towards the commission of such offense. This does not eliminate any of the elements of the common-law offense of attempt to commit crime. On the contrary, it enumerates them. To constitute an attempt, at the common law, something more than an intention or purpose to commit crime is necessary. As was said by Field, C. J., in *People v. Murray*, 14 Cal. 159:

“Between preparation for the attempt and the attempt itself there is a wide difference. The preparation consists in devising or arranging the means or measures necessary for the commission of the offense. The attempt is the direct movement towards the commission after the preparations are made.”

In *Reg. v. Taylor*, 1 Fost. & F. 512, the chief baron said:

“The act, to constitute a criminal attempt, must be one immediately and directly tending to the execution of the principal crime, and committed by the prisoner under such circumstances that he has the power of carrying his intention into execution. If two persons were to agree to commit a felony, and one of them were, in execution of his share in the transaction, to purchase an instrument to be used in the course of the felonious act, that would be a sufficient overt act in an indictment for conspiracy, but not in an indictment of this nature.”

See, also, *McDade v. People*, 29 Mich. 50; *Hicks v.*

Com., 86 Va. 223 (19 Am. St. Rep. 891); *Reg. v. McCann*, 28 U. C. Q. B. 514; *Stabler v. Com.*, 95 Pa. St. 318 (40 Am. Rep. 653); *Com. v. McDonald*, 5 Cush. 367; *Griffin v. State*, 26 Ga. 493; *People v. Machen*, 73 Mich. 27; 3 Am. & Eng. Enc. Law (2d Ed.), 266.

The sentence is set aside, and the prisoner discharged.

HOOKE, MOORE, and LONG, JJ., concurred with MONTGOMERY, J.

GRANT, C. J. (*dissenting*). The respondent was convicted under the following statute:

“Every person who shall attempt to commit an offense prohibited by law, and in such attempt shall do any act towards the commission of such offense, but shall fail in the perpetration, or shall be intercepted or prevented in the execution, of the same, when no express provision is made by law for the punishment of such attempt, shall be punished as follows,” etc. 3 Comp. Laws 1897, § 11784.

The information charges an attempt to break and enter the dwelling house of one Ralph Walker on May 27, 1899. The acts charged are that—

“He, the said Clarence Youngs, came to Hillsdale, Michigan, said Hillsdale, Michigan, being towards the dwelling house of the said Ralph Walker from the home of the said Clarence Youngs, at which place, Hillsdale, he loaded a revolver, and secured other cartridges therefor, and purchased a drug known as ‘chloroform,’ to be used in the commission of said offense, but he, the said Clarence Youngs, failed in the perpetration of said offense, and was intercepted and prevented in the execution of the same by being arrested.”

The facts shown by the prosecution are these: Respondent lived about nine miles southeast of Hillsdale. Had worked husking corn in the fall of 1898 for Mr. Walker, who lived about 10 miles northeast of Hillsdale. On May 22d one Munson Foughty met respondent in a saloon in Hillsdale. He proposed to Foughty to go over to Walker’s and get his money. He stated to Foughty that Walker was possessed of a considerable sum of money; that he

knew where Walker kept it,—in the bureau drawer; and that he would get a pair of carpet slippers and a little chloroform. He fixed the following Saturday night as the time for the commission of the crime, telling Foughty that he would be in Hillsdale on Saturday for that purpose, and requested Foughty to meet him at the saloon. Foughty met him on that day at the appointed place. Respondent had a revolver, went out and purchased some cartridges, and returned to the saloon, and the two went down in the basement of the saloon. Respondent then loaded his revolver, saying, "That came pretty near killing one man the other night, and I am going to have that money tonight, or it will kill another man." He asked Foughty if he had a revolver, and Foughty replied that he had. Respondent then went into a drug-store and purchased some chloroform, to be used in the commission of the crime. He had the slippers upon his person, to be used in entering the house. On emerging from the drug-store he was arrested, and the slippers, chloroform, revolver, and cartridges were found upon his person. He further stated to Foughty that he knew where Walker lived; that he would get in through the window and chloroform him. When arrested, he denied having any chloroform, and, when it was found, said that his mother had sent him for it. These facts were not controverted, as respondent introduced no testimony.

It is contended that these acts do not constitute an attempt to commit the crime, but only a preparation, which the statute does not cover. Two things are essential to constitute an attempt, under the statute: (1) The intent to commit the crime; (2) some act or acts which are necessary towards its perpetration. Hochheimer, in his recent work on the Law of Crimes and Criminal Procedure (section 516), thus defines a common-law attempt:

"Any act in the nature of a direct movement towards the commission of an offense is an attempt to commit the offense. It is sufficient that one step be taken towards the actual commission of the crime; but mere preparation or planning is insufficient."

Wharton says:

"An attempt is such an intentional preliminary guilty act as will apparently result, in the usual course of natural events, if not hindered by extraneous causes, in the commission of a deliberate crime." 1 Whart. Cr. Law (10th Ed.), § 179.

See, also, 3 Am. & Eng. Enc. Law (2d Ed.), 250.

The authorities generally recognize the difficulty in determining what constitutes an attempt under this and similar statutes. How remote the act, coupled with the felonious intent, must be from the consummation of the crime, depends upon the various circumstances of each case. There is no simple and infallible test. 3 Am. & Eng. Enc. Law (2d Ed.), 265. The act need not be the last proximate one prior to the consummation. The felonious intent in this case is clearly established. The acts done were clearly in furtherance of that intent. Whether they were too remote is the sole question. In the early case of *Rex v. Sutton*, 2 Strange, 1074, the prisoner was held properly convicted for having in his custody and possession two iron stamps, with the intent to impress the scepters on sixpences and to pass them off for half guineas. The prisoner was held properly convicted of an attempt to commit burglary where he was intercepted while going up the steps of a house in the night-time, where he had no legitimate business, and had burglarious tools in his possession. *Com. v. Clark*, 10 Pa. Co. Ct. R. 444. The statute in that case authorized conviction for an attempt to commit the crime. It contained no language like that in the statute before us. The court commented upon the fact that the prisoner had left the public street, to go upon private property. If he had been arrested in the highway, why would not the attempt have been as complete? In an attempt to commit arson, it was held that those who were absent, knowing with what intent the others went, and assenting to it, were principals. *Uhl v. Com.*, 6 Grat. 706. Where one procured dies for stamping and imitating coin, but was apprehended

before he obtained the metal and the chemical preparations necessary for making them, he was held properly convicted of an attempt. *Reg. v. Roberts*, 33 Eng. Law & Eq. 553. The chief justice in that case stated that he would not attempt to lay down any rule as to what act done in furtherance of criminal intent will warrant an indictment, saying that he did not see the line precisely himself, but said, "No one can doubt that the procuring the dies and machinery was necessarily connected with the offense, and was for the express purpose of the offense." Procuring indecent prints, with the intent to publish them, was held an indictable offense, while preserving and keeping them with a like intent would not be. *Dugdale v. Reg.*, 1 El. & Bl. 435. The principle of that case is that procuring is an overt act, while possession alone is not. Where one procured camphene and other combustibles, placed them in his room, solicited another to use them in burning a barn, and promised to give him a deed to land if he would do so, he was held properly convicted of an attempt to commit arson. *McDermott v. People*, 5 Parker, Cr. R. 102. It is there stated:

"The two important and essential facts to be established to convict a person of an offense, are: *First*, an intent to commit the offense; and, *second*, some overt act, consequent upon that intent, towards its commission. So long as the act rests in bare intention, it is not punishable. '*Cogitationis poenam nemo patitur.*' It is only when the thought manifests itself by an outward act in or towards the commission of an offense, that the law intervenes to punish. As we cannot look into the mind to see the intent, it must, of necessity, be inferred from the nature of the act done; and, if that be unlawful, a wicked intent will be presumed. These are fundamental legal principles. Now, applied to the facts of this case, what do we find? We find that the defendant intended to commit the crime of arson. Indeed, he had committed the offense 'already in his heart.' What were the overt acts towards the commission? He had prepared camphene and other combustibles, and had them in his room, and then he went a step further, and solicited McDonnell to use those combustibles to burn the building, promising him, if

he would do so, to 'give him the deeds of the place, and assign to him his right in the same.' We have, then, the fixed design of the defendant to burn this barn, and overt acts towards the commission of the offense, and a failure in the perpetration of it. The offense, then, is fully made out; for the intent to do the wrongful act, coupled with the overt acts towards its commission, constitutes the *attempt* spoken of by the statute."

Where the prisoner entered into conspiracy with others to place a dangerous explosive upon the track of a railroad company, so that it would be exploded by a passing train, had met the other conspirators at the house of one of them, where the bomb was prepared and committed to the prisoner, and the conspirators agreed to meet at half-past 4 o'clock in the morning, at the junction of two streets, for the purpose of immediately proceeding to put their project into execution, and the prisoner had left his dwelling to join his confederates pursuant to the appointment made on the preceding day, approached the place of rendezvous with the bomb in his possession, and was intercepted by the police, he was held properly convicted. The statute in that case provided that "any person who attempts to maliciously place an obstruction upon the track of a railroad," etc. *People v. Stites*, 75 Cal. 570. See, also, *People v. Mann*, 113 Cal. 76. Where one had taken an impression of a key to a warehouse, and prepared a false key, which he had in his possession, with the intent to break and enter, he was held properly convicted under a statute identical with this. *Griffin v. State*, 29 Ga. 493.

The cases upon this subject are very numerous, and undoubtedly many might be cited from which it might fairly be inferred that the courts which decided them might hold that the acts in this case were too remote, and constituted merely a preparation, which the law does not recognize and punish as criminal. One of the strongest cases cited is *People v. Murray*, 14 Cal. 159, where it was held that an attempt to commit an incestuous marriage was not established by an elopement for the

avowed purpose, and the request to another to go for a magistrate to perform the ceremony. It was also said that the attempt could only be consummated by engaging the officer to perform the ceremony, with the parties standing before him to take the vows preparatory to the contract of marriage. The statute in that case is not stated in the opinion. Bishop, in speaking of this case, says, "We cannot safely assume that it will be followed by all courts." 1 Bish. New Cr. Law, § 764. I cannot yield it my assent.

In *Reg. v. McCann*, 28 U. C. Q. B. 514, three entered into conspiracy to commit burglary. One was kept away by his father, who had discovered their design. The other two (the prisoners) went to within about 14 feet of the house, stood outside of the fence awhile, and then went away. It might well be held in that case that there was no attempt, on the ground that they had abandoned their intent to commit the crime. The court said:

"The bare fact that the prisoners were seen looking at the house at the distance of 13 or 14 feet is not of itself a crime, and, although it may be said they were near the premises upon the understanding previously entered into, yet there is no evidence of the fact. For all that appears, they may have changed their minds, and, in the absence of their comrade, went there with some other object, or for some other purpose, and not with the intent charged."

We are also cited to *Hicks v. Com.*, 86 Va. 223 (19 Am. St. Rep. 891). In that case the prisoner was charged with an attempt to administer poison, by soliciting one Laura Long, for a promised reward, to administer the same, and that the poison was delivered to her. The court said, "It was not charged that she agreed to administer the poison, or that she did any act towards the commission of the crime." On the contrary, she testified that she never did agree to administer it, and never intended to; that she wanted to fool Hicks, because she wanted to catch him, and to let other people know it. One justice dissented.

Under a statute identical with ours, on a charge of an attempt to commit incest, mere solicitation was held insufficient; and the court say :

“The statute must be construed, in cases like the present, to mean a physical act, as contradistinguished from a verbal declaration; that is, it must be a step towards the actual commission of the offense, and not a mere effort, by persuasion, to produce the condition of mind essential to the commission of the offense.” *Cox v. People*, 82 Ill. 191.

Counsel says that though one may intend to commit a crime, and do many things towards its commission, yet he may repent, and the law gives to him a *locus pœnitentiæ*. But where is this *locus*? Is it at the window which he proposes to enter? or at the gate to the inclosure of the dwelling? or at the dividing line between the public highway and private property? How much distance and time does the law give him to repent? Conversions like that of Paul are rare, especially among criminals. The law will not “o’erleap itself” to find a time and place for repentance, when the criminal has started forth, armed and equipped to carry out his felonious intent. It may refuse conviction when repentance and abandonment are shown, but not till then. The only reasonable and just rule, in my judgment, is that when one has prepared himself with weapons and tools for the purpose of accomplishing a crime, and has started out to accomplish it, the offense is complete, unless it is shown, as was the case in *Reg. v. McCann*, 28 U. C. Q. B. 514, that he had abandoned his purpose. It would be difficult, if not impossible, to harmonize all the cases. No two are alike in their facts. In the case before us, the plan was perfected. All the preparations were made for carrying it out. The respondent left his home, with the revolver and slippers; had traveled nine miles towards the place; had then provided himself with chloroform, and loaded his revolver; had met his supposed co-conspirator at the place of rendezvous. All these acts were done for the express purpose of committing

the crime, and he was prevented from the commission by his arrest. I think that the steps taken constitute something more than a bare preparation, and were acts towards the commission of the crime, within the meaning of the statute.

The conviction should be affirmed.

HEILMAN v. PRUYN.

1. SALE OF FRUIT TREES—BREACH OF WARRANTY—DAMAGES.

Where fruit trees are bought to be set out on an agreement that they shall be of certain varieties, or others equally desirable, and, on commencing to bear, they are found to be of an inferior variety, the measure of damages is the value that would have been added to the premises if they had been of the varieties contracted for.

122	301
f126	20
122	301
128	59
128	60
122	301
s81NW	97
s80ASR	570

2. SAME.

In an action to recover damages for selling plaintiff fruit trees of a variety inferior to those ordered by him, it cannot be shown in defense that the breach of contract was harmless for the reason that the trees were winter-killed after the commencement of suit.

Error to Kent; Grove, J. Submitted October 27, 1899.
Decided December 12, 1899.

Assumpsit by Albert Heilman against John Pruyn for breach of warranty on a sale of fruit trees. From a judgment for plaintiff, defendant brings error. Affirmed.

Plaintiff purchased of defendant, in 1895, 200 peach trees, and, in 1896, 100 peach trees, under an agreement that they were to be Late Crawfords and Smocks, unless the variety ordered could not be supplied, in which event

defendant agreed to furnish other varieties equally desirable. The trees were furnished, set out, and taken care of. Plaintiff gave evidence tending to show that most of the trees came into bearing in the fall of 1898; that none of them were of the varieties ordered; that there were no Late Crawfords or Smocks, and that they were of an inferior variety, producing small, white peaches, many of them clingstones, and some seedlings; that the fruit was unsalable, and the trees were practically worthless. Plaintiff recovered a verdict and judgment for \$300.

Peter Doran, for appellant.

Wolcott & Ward, for appellee.

GRANT, C. J. (*after stating the facts*). 1. What is the measure of damages? This is the principal question. Defendant contends that the rule of damages is the money paid out for the trees, the cost of setting out and caring for them up to the time of the suit, and the use of the land which they were occupying. The court instructed the jury that the measure of damages was the value that would have been added to the premises if the trees had been of the varieties ordered. We think the court announced the correct rule. "The primary purpose of awarding damages is actual compensation to the party injured, whether by a tort or by breach of a contract." 8 Am. & Eng. Enc. Law (2d Ed.), 546, and note 2. In *U. S. v. Taylor*, 35 Fed. 484, it was held that:

"In an action for damages in cutting growing timber or trees, the recovery is not limited to their actual value for firewood, turpentine purposes, or for timber or lumber purposes, but the actual injury to the estate by the cutting of the trees; and in determining the question it is proper to show the purpose for which the trees were designed and could have been used."

In *Stoner v. Railway Co.*, 45 La. Ann. 115, it was held that the measure of damages for the destruction of

fruit trees by fire is not the cost of replacing them, and the value of the care and labor bestowed on them, but the value of the destroyed trees at the date of the fire. The like rule was held in *Norfolk, etc., R. Co. v. Bohannon*, 85 Va. 293, and in *Montgomery v. Locke*, 72 Cal. 75. The case of *Dwight v. Railroad Co.*, 132 N. Y. 199 (15 L. R. A. 612, 28 Am. St. Rep. 563), is an instructive case, and points out the distinction between the measure of damages where forest trees, fully grown, are unlawfully severed from the soil, and where nursery trees are so severed. In the former case there may be no injury to the freehold, when the value of the trees must furnish the sole measure of damages. In the latter case, when fruit trees are severed, they are of practically no value. In such cases there are two elements of damages: (1) The value of the trees cut, if they have any; and (2) the damage to the realty.

Counsel for defendant cites *White v. Miller*, 71 N. Y. 118 (27 Am. Rep. 13). In this case cabbage seed was sold, warranted to be genuine Bristol cabbage seed. The seed was not as warranted. It was held that the proper measure of damages was the difference in value between the crop raised from the defective seed and a crop of Bristol cabbage such as would ordinarily have been produced that year. Other cases of this character are cited. Where crops are raised from seeds, and mature in a few months, and the value of the land is not affected thereby, no other rule of damages can obtain. It is different, however, where fruit trees are planted, which will not mature for years, which become a part of the realty, and materially add to its value. The destruction of a crop of cabbage, corn, wheat, or other annuals does not injure the land, and consequently there can be but one rule of damages. The most of the cases cited by the defendant are cases of this character. The other cases cited involve the question of speculative damages, which is not involved in this case. It is a matter of common knowledge that lands are enhanced in value by orchards of fruit trees. They

have a value capable of estimation, for the reason that they usually yield fruit. The case is not one of speculative damages, but of enhanced value by additions to the realty. The rule of damages ought to be, and is, the same where worthless fruit trees are furnished, contrary to the warranty, as where good fruit trees are destroyed by the negligent acts of others. The purchaser has suffered the same damages in each case. Both parties must be held to have contracted with reference to the land in future years, as it would be enhanced by the existence of trees of the kind warranted. The difference between the value of the land with and without the trees is the just measure of damages. 26 Am. & Eng. Enc. Law, 565, note 1.

2. Error is assigned upon the rejection of testimony as to the condition of the trees immediately before the trial, and after the severe winter of 1898-99. The object was to show that the trees, or many of them, had been injured or killed by the severe cold weather after this suit was brought, and to claim that plaintiff had, therefore, suffered no damage by the failure of the defendant to keep his contract. The ruling of the court was correct. The law does not permit the defendant to avoid his contract because the trees were injured or destroyed by circumstances beyond the control of the parties. The rights of the parties were to be determined by the situation of affairs at the commencement of the suit. If, by the act of God afterwards, the trees were destroyed, this fact furnished no defense. If they had been valuable trees, and had been injured through the neglect of the plaintiff, the rule would be different.

Judgment affirmed.

The other Justices concurred.

MICHAUD *v.* GRACE HARBOR LUMBER CO.¹

1. DOCKS—DEFECTIVE CONSTRUCTION—INJURY TO VESSEL—ASSUMPTION OF RISK..

Where it is not clear that a shipmaster's acquaintance with a dock, which he had used on prior occasions, was such that he must have known that the snubbing-post to which he tied up was not properly braced underneath, it was for the jury to say whether or not, in view of the dock-owner's directions to tie to the particular post, and his assurance that the dock was perfectly safe, he assumed the risk of injury to the vessel occasioned by the post's canting over in a storm and releasing the boat.

2. SAME—CONTRIBUTORY NEGLIGENCE OF SHIPMASTER.

It cannot be said, as a matter of law, that a shipmaster was guilty of negligence, precluding a recovery against a dock-owner for injury to a vessel caused by the giving way of a snubbing-post improperly braced, although the post gave indications of giving way two hours before the accident, where the master testifies that it was dark and stormy at the time, that all the lines were out, and that he was unable to get to them after dark.

3. DAMAGES—EVIDENCE OF VALUE—WITNESSES.

In an action to recover for injuries to a vessel, it was proper, on the question of damages, to show her value before and after the injury; her owner, who had owned other vessels also, being competent to express an opinion as to her original value; but the speculations of persons who had not examined her, as to whether it would be possible to tell the extent of her injuries, were properly excluded.

4. SAME—NONJOINDER OF PLAINTIFFS.

The nonjoinder of a plaintiff in an action of tort, unless pleaded in abatement, can be taken advantage of by defendant only by way of restricting the plaintiff's recovery to his apportionable share of the damages.

Error to Wayne; Waite, J. Submitted October 27, 1899. Decided December 12, 1899.

¹ Rehearing denied January 23, 1900

122 MICH.—20.

Case by Theophilus Michaud against the Grace Harbor Lumber Company for maintaining a defective dock. From a judgment for defendant on verdict directed by the court, plaintiff brings error. Reversed.

Wilkinson, Post & Oxtoby and *Walter E. Oxtoby*, for appellant.

Warner, Codd & Warner, for appellee.

MONTGOMERY, J. The plaintiff is a half owner of the schooner "John Jewett." The defendant is a corporation doing business at Hammond's Bay, Presque Isle county. In October, 1898, the defendant, through its officers, chartered the vessel to go to the defendant's dock at Hammond's Bay, and take on a load of lumber to be transported to Detroit. The vessel was sent in charge of her master, Capt. Stone, and arrived at the defendant's dock on Sunday, the 16th of October. In the evening of the following day she broke from her mooring, and was driven ashore. This action is brought to recover for damages sustained, the plaintiff's claim being that the dock was improperly constructed, in that the "snubbing-posts" were not braced, that the piles under the dock were not braced, and that the flooring of the dock surrounding the snubbing-posts was constructed of short pieces of plank, laid independently of the main flooring of the dock; that by reason of these defects the dock was not a safe place to moor; that the snubbing-post to which the main line was fastened canted over, allowing the line to slip from it; and that this was the cause of the wreck. The defendant contends that the master of the vessel knew all about the dock, having been there and having made use of it on other occasions, and assumed whatever risk there was; that the master was at fault in the manner in which he made fast the vessel, and that the dock was reasonably safe; that the loss was more properly attributable to excessive high wind than to any fault of the defendant's dock. The learned circuit judge was of the opinion that no case

had been made entitling plaintiff to take the judgment of the jury, and directed a verdict for the defendant. The grounds upon which this action was taken were stated by the circuit judge as follows:

"The Grace Harbor Lumber Company constructed the dock apparently for its own use. It would be responsible, I think, for any damages which might occur to those who tied up to the dock relying upon their representations absolutely; but under the circumstances of this case, and from the facts in this case, it appears to me that the master of the vessel was fully cognizant of all the risks taken, except, perchance, the one risk which would be attendant upon the giving way or the moving of this particular spile at the southeast corner of the dock. It is claimed here by the plaintiff that the loss was occasioned by the moving of this spile,—by its canting over, and allowing the bights of the rope to slip off. There is the principal center of interest in this case. It all hinges upon the responsibility resting upon both parties as to that spile. There were other spiles about and in the dock. About 9 o'clock, as I remember the testimony, this spile began to move, and it tore up the planking. This was known to the master of the vessel, and, of course, what was known to him in this case was known to the owner, the plaintiff. For two hours or a little over that was swaying and moving, and finally, after two hours or a little more, these bights slipped off. In the meantime nothing had been done to insure the safety of this vessel. The wind was blowing at about 30 miles an hour or more. The vessel was pitching. The dock still remained after the vessel broke away. I do not think the plaintiff could recover in this case, not having done any more, after having received notice of the giving way of this spile, not having done any more than the testimony shows he did do. I do not think he is in a position to recover in this case, because, in my judgment, he was guilty of contributory negligence, or, rather, did not use that ordinary prudent care which a master of a vessel should, under the circumstances, to preserve the property."

The question for our determination is, therefore, whether there was any testimony legitimately tending to establish the theory of the plaintiff.

It appeared by the testimony of Capt. Stone that he

had on several prior occasions loaded at this dock; that before the Jewett was chartered he had a conversation with Mr. Begle, an officer of defendant, in which he said to Mr. Begle that the dock was not safe to go to. Mr. Begle replied that the harbor was safe enough to stay at all winter; that the dock was all right; that there need be no fear of the dock. Mr. Begle said: "The dock is strong enough to tear your vessel to pieces." The witness further testified that Begle told him on Monday that the post at the middle of the southeast end of the dock was not safe to hold to, but that the outside spile or post near the southeast corner of the dock was sufficient to hold the vessel. This latter was the post to which the vessel was made fast. Another line was also carried from another part of the vessel, and made fast at a point farther towards the shore, on the dock, and another at a so-called "derrick pile" or "crane" in the middle of the dock. Between 11 and 12 o'clock Monday night, the snubbing-post at the southeast corner of the dock canted over, and the lines slipped off, so that a single line held on that snubbing-post, and it parted. The manner in which this line was fastened to this snubbing-post was by first taking a turn with the rope at the post; then two half hitches in the rope, thus making it fast to the post; the line was then taken aboard the vessel, and a turn taken around one of the forward timber-heads; then the line led back to the snubbing-post, where they took a "bight," so called; then led back to the vessel, where a single turn was taken around the other forward-port timber-head; then the line was taken back to the snubbing-post, and another bight taken in the line; and so on, until there were five strands of this three-inch line running from the vessel to the snubbing-post. A "bight" is described as a single turn around the snubbing-post. These bights were placed at about the hitch or place where the line was fastened to the post. It is claimed by the defendant that this method of fastening the vessel was an improper one, and brought an unnecessary strain upon the snubbing-post.

Capt. Boston was called as a witness by the plaintiff to show the improper construction of the dock. On cross-examination he was asked about the propriety of the method adopted in making the line fast, and replied that, if he had been making it fast, he would have made the last turn with a lasso hitch, and gave further testimony indicating that good seamanship would require that method. If this testimony were not contradicted, it might be urged with much force that it establishes conclusively that the negligence of the shipmaster, to say the least, contributed to the result; but Capt. Baker testifies that the method employed was proper, as do Capt. Stone and the mate of the vessel. This question was therefore one for the jury.

We are also of the opinion that the question of assumed risk was for the jury. There was testimony tending to show that the snubbing-post which gave way was not properly braced underneath. We are not able to say that the acquaintance of Capt. Stone with the dock was such that he must have known of this defect, particularly in view of the testimony tending to show that Mr. Begle had assured him of the safety of the dock. If his previous knowledge was not such that he must be held to have known of the defect in question, the assurances given him by Mr. Begle are to be taken into account in determining whether he assumed a risk which he ought to have known the extent of. *Lake Superior Iron Co. v. Erickson*, 39 Mich. 492 (33 Am. Rep. 423); *Burnside v. Manufacturing Co.*, 121 Mich. 115.

Was the captain guilty of contributory negligence in failing to do all that he could to avoid disaster after the dock began to give way, and after the snubbing-post began to cant over? The circuit judge was of the opinion that he was guilty of such negligence, and appears to have determined the case on that point. We think the question was a proper one for the jury. All the lines were out, and Capt. Stone testifies that he could not get to the lines after dark on Monday. The case is evidently near the line, but we think, as the evidence stood, it was a case for the jury.

As bearing on the question of damages, we think it was competent, if the plaintiff was able to do so by competent witnesses, to show the value of the vessel before the injury, and her value as she was afterwards. We think, however, the court was right in excluding speculation, by any who had made no inspection of the vessel, as to whether it would be possible to tell what the extent of the injuries to her was. The value should be shown by one who knew enough of her condition to speak upon the subject. We think the plaintiff, who owned this vessel and has owned others, showed himself competent to express an opinion as to the value before the damage. *Erickson v. Draskowski*, 94 Mich. 551.

The point made by the defendant that there is a non-joinder of a necessary plaintiff, and that the plaintiff should not recover for this reason, is without merit. No plea in abatement was filed. In this state of the pleading, the most that the defendant can insist on is that the plaintiff be restricted in his recovery to the damages which he has sustained. 1 Am. & Eng. Enc. Pl. & Prac. 15; *Achey v. Hull*, 7 Mich. 423.

The judgment will be reversed, and a new trial ordered.

The other Justices concurred.

SELBY v. DETROIT RAILWAY.

1. TRIAL—OVERRULED OBJECTION—FAILURE TO EXCEPT—WAIVER.

An objection which is overruled is waived by failure to except to the ruling.

2. STREET RAILWAYS—MISJOINDER OF DEFENDANTS—OBJECTION AFTER VERDICT—NEW TRIAL.

Where two street-railway companies appear and plead the general issue to a declaration for personal injuries wherein they are joined as defendants, and both take part in the trial, upon which evidence is introduced tending to establish their liability, it is too late after verdict for one of them to raise the question that its co-defendant, from whose car plaintiff was thrown, was alone connected with the injuries, and that it was improperly joined as a defendant, and should be allowed a new trial.

3. SAME—DUTY OF CONDUCTORS—ASSISTING PASSENGERS TO ALIGHT.

An instruction, in an action against a street-railway company for personal injuries, that a carrier of passengers "must afford such care as is reasonably necessary to look after women and children in their alighting as well as their passage," is objectionable, as likely to be understood to mean that the conductor must assist women and children to alight.

4. TRIAL—CONDUCT OF COUNSEL—CONTRADICTING WITNESS.

Counsel should not be allowed to contradict witnesses without themselves being sworn.

5. SAME—IMPROPER ARGUMENT—VERDICT.

In an action for personal injuries, it was error to permit plaintiff's counsel, in commenting upon the verdict to be rendered, to declare to the jury that the defendant, a corporation, always carried its cases to the Supreme Court.

Error to Wayne; Donovan, J. Submitted October 27, 1899. Decided December 12, 1899.

Case by Marion Selby against the Detroit Railway and the Detroit Electric Railway for personal injuries. From a judgment for plaintiff, defendants bring error. Reversed.

122	311
137	487
137	499
122	311
141	113
122	311
146	387
122	311
147	174
122	311
153	523

Corliss, Andrus & Leete, for appellants.

James H. Pound, for appellee.

MOORE, J. The plaintiff received injuries while alighting from a street car. She obtained a judgment against defendants, from which judgment the defendants have appealed. We shall decline to pass upon some of the assignments of error, for the reason that no exceptions were taken to the rulings of the circuit judge. Under such circumstances, the objection which was overruled must be deemed waived.

After the judgment was entered, a motion for a new trial was made, which motion was overruled. One of the grounds of the motion on the part of the Detroit Electric Railway was that the verdict against the Detroit Electric Railway is unsupported by the evidence in the case, in that the Detroit Electric Railway does not operate, and was not connected, directly or indirectly, with the operation of, the car from which the said plaintiff claims to have been thrown and to have received her injuries. An affidavit was filed in support of this motion. The declaration filed in the case was against both of the defendants. It set up the cause of action in detail. Both defendants appeared, and pleaded the general issue. There was no suggestion that the Detroit Electric Railway had been improperly made a party, either in the pleadings, or by motion, or by a request to charge. It was not until after a verdict had been obtained against both defendants that it was claimed by one of them that it sustained any different relation to the case than did the other defendant. The defendant the Detroit Electric Railway knew just as well before the verdict as after whether it had been improperly joined. There was some evidence tending to show liability on its part. It would be unreasonable to hold that it might remain silent in relation to a defense of which it had knowledge, until after the expenses of a trial were incurred, and a verdict by a jury rendered, and then avail itself of its defense. We cannot say that such a

showing was made before the circuit judge that he erred in refusing a new trial.

Among other things, the court charged the jury as follows:

“It is the duty of the common carrier of passengers for hire to safely carry the passengers, and it must afford such care as is reasonably necessary to look after women and children in their alighting as well as their passage; but I will say here, I will leave it to the jury whether they are to look after them except at the regular alighting places; I will leave that to the jury.”

This is said to be error. The language used is not very happily chosen, and some things are left to the jury which it is the province of the judge to decide. It was the claim of the plaintiff that she had informed the conductor she wanted to alight at Park Place, but the conductor failed to stop until the car had got part of the way across Washington avenue, when it was brought to a full stop in response to the signal of the conductor to stop, and that just as the plaintiff was alighting, and about to step upon the pavement, the car was suddenly started, and she was injured. It was the claim of the defendant that a number of its cars were just ahead of the one in which plaintiff was riding, all of which proceeded slowly at this particular locality, and that the car was not stopped, but the plaintiff stepped off the car while it was in motion, and was hurt because of her own negligence. If the claim of the plaintiff was true, that she had been carried past the place where she desired to alight, and the car was stopped farther on by the conductor to enable her to alight, then it was negligence on the part of the company to start the car while she was in the act of stepping from the car to the pavement. The plaintiff was entitled to such an instruction. The language used did not convey that idea very clearly, but may have been understood by the jury as meaning that the conductor was not only bound to give women and children an opportunity to alight with safety, but must assist them in so doing.

The remaining question, necessary to be discussed, relates to the conduct of counsel in the examination of witnesses and the argument to the jury. The case seems to have been conducted with a good deal of bitterness upon both sides. In the cross-examination of witnesses, counsel upon both sides seem to have proceeded upon the theory that the witnesses called by the opposite party were untruthful. This gave rise to colloquies between counsel which ought to have been promptly suppressed by the trial court. Counsel upon both sides did not hesitate to contradict the witnesses without themselves being sworn. This ought not to have been done, and the court should not have allowed it.

When it came to the argument of the case, counsel upon both sides made statements to which opposing counsel took exceptions, while the trial judge remained silent, so far as the record discloses, during the argument. The statement made by the counsel for the plaintiff to which particular objection is made is as follows :

“I do not want you to go to the jury-room to cut down, on the ground there will be a settlement in this case; they will go to the Supreme Court; they always go there.”

This was an ingenious invitation to the jury to include in their verdict, not only the damages to which the plaintiff was entitled under the well-established rules of law, but an amount sufficient to compensate her for the expense of following her case to the Supreme Court. The record does not disclose what called out this statement. It was an improper one to make. It was not based upon anything in the record. Defeated litigants, whether corporations or individuals, have a right to take their cases to an appellate court without having it the subject of adverse criticism. If, when counsel challenged this argument, the judge had promptly instructed the jury that it was not a proper argument to make, the error might be overlooked; but, instead of doing so, the judge remained silent, thereby giving the jury the impression that

he approved of the statements of counsel. This court, in the recent case of *Britton v. Railroad Co.*, 118 Mich. 491, expressed its views in relation to what is not allowed in the argument of counsel. It is not necessary to repeat what is there said. The case comes within the reason of the rule as there stated.

Such of the other assignments of error as are properly here have not been overlooked, but we do not deem it necessary to discuss them, as they are not likely to arise again. For the errors indicated, the judgment is reversed, and a new trial ordered.

The other Justices concurred.

FERRIS v. BOARD OF EDUCATION OF DETROIT.

1. BOARD OF EDUCATION—FALL OF SNOW FROM SCHOOL BUILDING—TRESPASS—PERSONAL INJURY—PROXIMATE CAUSE.

Where a board of education erects a school building in such manner that ice and snow must inevitably slide from the roof onto plaintiff's premises, there being no sufficient barrier to prevent, and fails, after notice, to remedy the defect, it may be held liable to him for injuries sustained in falling upon ice so precipitated, the trespass being the proximate cause of the injury.

2. SAME—NOTICE OF CLAIM—STATUTES.

The city of Detroit being established by Act No. 283, Laws of 1869, for educational purposes, as a single school district under the control of a board of education, and such school district being an entity distinct from the municipality, except as brought into certain relations with it under special acts, the provision of the general charter (Act No. 463, Local Acts 1895, § 46) requiring notice of claims against the city, or any of its boards or commissions, for negligent injuries, to be given to the city counselor within three months from the time the injury occurs, has no application where injury is caused by the negligence of the board of education.

122	315
d139	1494
122	315
142	56
122	315
e146	215

8. NEGLIGENCE—ELECTION OF COUNTS.

A count alleging failure to erect sufficient barriers to prevent the sliding of snow and ice from a roof, and one alleging failure to keep such barriers in repair, are not so inconsistent as to require an election.

Error to Wayne; Frazer, J. Submitted October 27, 1899. Decided December 12, 1899.

Case by William Ferris against the board of education of the city of Detroit for personal injuries. From a judgment for defendant on verdict directed by the court, plaintiff brings error. Reversed.

Henry B. Graves and *George H. Carlisle*, for appellant.

Arthur Webster (*Charles Flowers*, of counsel), for appellee.

LONG, J. Plaintiff for a number of years has owned and occupied, with his family, a house and lot on Lysander street, in Detroit. His house stands within three feet of the east line of his lot, and a sidewalk extends along that side, filling the space between his house and the lot line. In 1896 the defendant erected what is called the "Poe School Building" on its lot on the east of plaintiff's lot. This building stands within six feet six inches of the lot line next adjoining plaintiff's lot. Its cornice projects four feet from the wall, bringing the edge of the cornice within two feet six inches of the plaintiff's lot. The school building is much higher than the plaintiff's house, and has a large amount of slate roof sloping towards plaintiff's lot. This roof, prior to the accident, had no projections or guards above the edge of the roof to interrupt the falling of snow and ice. During the winter months large quantities of snow and ice, when melting, slid down from this roof onto plaintiff's house and lot, and upon the sidewalk and steps which lead into the back part of plaintiff's house, and on one occasion his roof was in-

jured by this falling ice and snow. Prior to the accident he notified different members of the school board of the injury to his premises by the snow and ice, and his wife also notified the secretary of the school board of the fact. Nothing was done about the matter, however. On February 22, 1898, snow fell during the day, but stopped in the afternoon, and plaintiff's wife cleaned it off this walk and back steps. Subsequently, and before the accident, large quantities of snow and ice slid from the roof of the school building down upon these steps. Plaintiff, who is a fireman in the employ of the city, came home to his supper in the evening, when his wife informed him of the falling of the snow and ice. He stepped out through the back door, and upon this snow and ice, and claims that by reason of that he fell heavily, breaking a rib and otherwise injuring himself. This action is brought against the board of education to recover damages for such injuries.

The first count of the declaration charges the defendant with so constructing the building that the accumulations of rain, snow, and ice in the winter time would inevitably be precipitated upon plaintiff's premises; that the defendant failed to keep the roof clear from such accumulations; and that the defendant failed to provide sufficient gutters, eaves-troughs, screens, and combings, which would have prevented such precipitations. The second count charges the construction of the school building with gutters, eaves-troughs, screens, and combings, which were permitted to become and remain out of repair, and the falling of the snow and ice because of the lack of repair. Before any evidence was introduced, on motion of defendant's counsel, plaintiff was compelled to elect which count to proceed under. Plaintiff took an exception to the order, and elected to proceed under the first count. All evidence under the second count was rejected. The trial court held that the two counts were inconsistent. There was but little, if any, controversy over the facts as above set forth. The court below directed the verdict in favor of the defendant.

Apparently this direction of the verdict for defendant was based upon the fact that no written notice was given to the corporation counsel, or to his chief assistant, as provided by section 46, Act No. 463, Local Acts 1895; and also for the reason that the plaintiff had no right of action against the defendant, as it could not be held liable for the manner of the construction of the building. It is contended by counsel for plaintiff that the court was in error (1) in holding that no sufficient notice was given, and also in holding that notice was required; (2) in compelling the plaintiff to elect under which count he would proceed; (3) in directing the verdict for the defendant.

The trial court was of the opinion that the defendant, being a municipal corporation, could not be held liable for negligent injuries under the common law, and, there being no liability created by statute, the plaintiff could not recover. It is conceded by counsel for plaintiff that municipal corporations are not generally held liable, under the common law, for negligent injuries to individuals arising from defective plans of construction of public works or failure to keep the same in repair; but it is contended that, where the injury is the result of the direct act or trespass of the municipality, it is liable, no matter whether acting in a public or private capacity. We are satisfied that counsel for plaintiff are right in this contention. The plaintiff had the right to the exclusive use and enjoyment of his property, and the defendant had no more right to erect a building in such a manner that the ice and snow would inevitably slide from the roof, and be precipitated upon the plaintiff's premises, than it would have to accumulate water upon its own premises, and then permit it to flow in a body upon his premises. It has been many times held in this court that a city has no more right to invade, or cause the invasion of, private property, than an individual. In *Rice v. City of Flint*, 67 Mich. 401, it was said:

“For a direct act which causes water to flow upon the premises of another, to his injury, a municipality is respon-

sible. A city has no more right to invade, or cause the invasion of, private property, than an individual,"—citing 2 Dill. Mun. Corp. §§ 1042, 1043; *Byrnes v. City of Cohoes*, 67 N. Y. 204; *Noonan v. City of Albany*, 79 N. Y. 470 (21 Alb. Law J. 174, 35 Am. Rep. 540); *Inman v. Tripp*, 11 R. I. 520 (23 Am. Rep. 520); *Ross v. City of Clinton*, 46 Iowa, 606 (26 Am. Rep. 169); *Ashley v. City of Port Huron*, 35 Mich. 296 (24 Am. Rep. 552); *Pennoyer v. City of Saginaw*, 8 Mich. 534.

If this action had been commenced for damages to the plaintiff's freehold, had any resulted, there could arise no doubt of his right to recover. The declaration alleges the damages to have accrued to the plaintiff by his slipping upon the ice which fell from the roof of the defendant's building upon plaintiff's premises, and that the defendant had had notice of the fact that snow and ice had from time to time been so precipitated upon the premises, and defendant had neglected, and continued to neglect, to take the steps necessary to prevent the same. The declaration, therefore, counts upon an actionable wrong. The cause of action is not a neglect in the performance of a corporate duty rendering a public work unfit for the purposes for which it was intended, but the doing of a wrongful act, causing a direct injury to the person of the plaintiff, while outside the limits of the defendant's premises. We think it must be said that the erection of the building without these barriers was the proximate cause of the injury. An injury has happened by the defendant's wrongful act, and it cannot be set up as a defense that there was a more immediate cause of injury. To entitle a party to exemption, he must show, not only that such injury might have happened, but that it must have happened, if the act complained of had not been done. *Davis v. Garrett*, 6 Bing. 716. Judge COOLEY, in his work on Torts, at page 71, gives some illustrations from cases cited by him. He says:

"We may pause here to give some illustrations of this proposition, beginning with the leading case of *Scott v. Shepherd*, 3 Wils. 403, 2 W. Bl. 892, where the facts were that the defendant threw a lighted squib into a crowd of

people, one after another of whom, in self-protection, threw it from him, until it exploded near the plaintiff's eye, and blinded him. Here was but a single wrong, the original act of throwing the dangerous missile; and, though the plaintiff would not have been harmed by it but for the subsequent acts of others throwing it in his direction, yet, as these were instinctive and innocent, it is the same as if a cracker had been flung, which had bounded and rebounded again and again before it struck out the plaintiff's eye, and the injury is therefore a natural and proximate result of the original act. It is an injury that should have been foreseen by ordinary forecast, and, the circumstances conjoined with it to produce the injury being perfectly natural, these circumstances should have been anticipated."

In the present case it appeared that snow and ice must inevitably slide from this slate roof, as there were no barriers to prevent it. The school board had notice of it. It should have anticipated that the plaintiff or his family might receive an injury by the falling of the snow and ice, or that, by attempting to travel or go over it, they might be injured in that way. The defendant cannot now say that the injury *must* have happened the plaintiff if the snow and ice had not been thrown upon these premises.

But it is contended by the defendant, and so held by the court below, that the plaintiff cannot maintain this action, because he has not complied with the provisions of Act No. 463, Local Acts 1895, § 46, which provides:

"No action shall be brought against said city, nor any of its boards, commissions, or officers, for any negligent injury, unless it be commenced within one year from the time when the injury was received, nor unless notice shall be given in writing, within three months from the time of such injury, to the head of the law department, or to his chief assistant, of the time, place, and cause of such injury, and of the nature thereof."

Plaintiff's counsel contend (1) that a sufficient notice was given; (2) that this statute has no reference to the board of education of Detroit.

We need not discuss the question of whether there was a proper notice, as we are satisfied that this statute has no reference to the defendant here.

By Act No. 233, Laws of 1869, free schools were established in the city of Detroit. The whole city was by the act established one school district. The act provided for a board of education, and clothed said board with certain powers, among which was the right to purchase lands for school purposes, erect school buildings, and appropriate moneys therefor. The recorder's court was given jurisdiction of all suits which the board might be a party to, and of all prosecutions for the violation of the ordinances and by-laws of the board. This act is no part of the city charter. While the act has been several times amended, the school district remains a distinct entity, and has no connection with the city government as such, except as the act provides, by the amendment of 1891, that the common council of the city shall cause to be levied a sum not exceeding in any one year five mills on the dollar of all the property of the city, and the moneys thus raised to be paid to the treasurer of the board of education. Act No. 397, Local Acts 1891. By the amendment of 1893, it is provided that the board of education shall transmit to the common council of the city an estimate of the amount of money it may deem necessary for the purchase of lots, etc. Act No. 394, Local Acts 1893. By Act No. 233 of the Laws of 1869, the mayor of the city was made *ex officio* member of the board, but given no vote therein; and in 1893 an amendment to the act provided that "every resolution or proceeding of the said board of education whereby any liability or debt may be created, or originating the disposal or expenditure of property or money, shall, before it takes effect, be presented by the secretary of said board to the mayor of said city of Detroit. If the mayor approve thereof, he shall thereon write his approval; * * * and such as he shall not so approve and sign he shall return to the board, with his objections thereto," etc. Act No. 394, Local Acts 1893, § 26. The same section,

however, provides that the board of education may, by a two-thirds vote of its members, pass the same over the mayor's veto. It is evident, from these provisions of the statute, that the school-district board is not one of the boards mentioned in the act referred to, and no notice to the corporation counsel was required before action could be commenced. In *Pingree v. Detroit Board of Education*, 99 Mich. 404, the provision of the statute making the mayor of Detroit *ex officio* member of the board, and his right to veto certain measures of the board, were under discussion. It was not then intimated that the school district was not a separate entity from the city, but the question was whether the legislature might provide in a school district for such an officer with such powers, and it was held that the legislature had power to do so.

It is further contended that the court was in error in requiring counsel for plaintiff to elect which of the two counts of his declaration he would proceed under. We have stated that the substance of the two counts was—*First*, a failure to erect sufficient barriers to prevent the snow and ice from sliding from the roof; and, *second*, a failure to keep such barriers in repair. There is no such variance between these two counts as warranted the court in ruling that an election must be made.

The judgment below must be reversed, and a new trial awarded.

The other Justices concurred.

. CARPENTER v. ST. CLAIR CIRCUIT JUDGE.

122	828
881	95
0188	*122

1. PARTNERSHIP—BILL FOR ACCOUNTING—PARTIES—ADMINISTRATOR OF DECEASED PARTNER.

The rule that the administrator of a deceased partner is a necessary party to a bill for an accounting applies where the firm is composed of an individual and another firm, one of whose members is deceased.

2. MANDAMUS—ORDER OVERRULING PLEA IN ABATEMENT.

Mandamus will lie to compel a circuit judge to vacate an erroneous order overruling a plea in abatement.

Mandamus by Angus M. Carpenter to compel Samuel W. Vance, circuit judge of St. Clair county, to vacate an order overruling a plea in abatement. Submitted November 7, 1899. Writ granted December 12, 1899.

Atkinson, Wolcott & Moore, for relator.

Frank Whipple, for respondent.

MONTGOMERY, J. One Otis Joslyn filed a bill for an accounting in the St. Clair circuit court, in chancery. The bill alleged that a copartnership existed, consisting of Angus M. Carpenter and Brooks, Joslyn & Co.; that the firm of Brooks, Joslyn & Co. was composed of Otis Joslyn and George Brooks, deceased. The defendant filed a plea setting up that one John Jenkinson had been duly appointed administrator of the estate of George Brooks. This plea came on to be heard, and was overruled. The question presented is whether the administrator is a necessary party. The rule is stated to be that the administrator of a deceased partner is a necessary party to a bill for an accounting. 2 Bates, Partn. § 931, and cases cited; *Jenness v. Smith*, 58 Mich. 280. The fact that the bill alleges that Brooks, Joslyn & Co. was one member of the firm, and Carpenter the other, cannot affect this rule. The most that can be said is that such

avement affects the *extent* of the interest of the representatives of George Brooks.

Mandamus is a proper proceeding. *Chapin v. Montcalm Circuit Judge*, 104 Mich. 232; *O'Brien v. Alpena Circuit Judge*, 106 Mich. 42.

The writ will issue, directing the respondent to vacate the order overruling the plea, and to take such further action as may be deemed proper.

The other Justices concurred.

ALLEN v. BOARD OF STATE AUDITORS.

1. CONSTITUTIONAL LAW—INVESTING BOARD WITH FUNCTIONS OF APPELLATE COURT.

A joint resolution of the legislature authorizing the board of state auditors to investigate the claim of innocence of one who was legally convicted of a crime, and who served in prison a part of the sentence imposed upon him, and to allow him, if it find his innocence established, a money compensation, is void as creating, in effect, a court of appeals other than the judicial ones authorized by the Constitution.

2. SAME—APPROPRIATIONS BY LEGISLATURE—TWO-THIRDS VOTE—JOINT RESOLUTIONS.

The two-thirds vote of the legislature, essential under article 4, § 45, of the Constitution, to the validity of any "bill appropriating the public money or property for local or private purposes," is equally requisite where such an appropriation is attempted by joint resolution.

3. SAME—BOARD OF STATE AUDITORS—ADJUSTING CLAIMS—EXTENT OF POWERS.

A petition for compensation by a citizen who served a term in prison for a crime of which, it is alleged, he was innocent, is not a "claim" which the board of state auditors may be authorized to pass upon under article 8, § 4, of the Constitution, creating such board "to examine and adjust all claims against the State;" claims, within the meaning of such provision, embracing only demands based on legal grounds.

Mandamus by Thomas Allen to compel the board of state auditors to pass upon a claim. Submitted November 7, 1899. Writ denied December 12, 1899.

Edward S. Grece (*Lewis M. Miller*, of counsel), for relator.

Horace M. Oren, Attorney General, for respondent.

GRANT, C. J. The following joint resolution was passed by the legislature of 1899:

“Joint Resolution to provide for the Relief of Thomas Allen.

“*Whereas*, it satisfactorily appears that Thomas Allen, now of the city of Detroit, was, on or about the twentieth day of August, eighteen hundred and ninety, arrested at the city of Grand Rapids upon the charge of ‘assault with the intent to do great bodily harm,’ and taken a prisoner to the county jail of Mecosta county, and there confined until the fourteenth day of November following, and then tried and convicted upon said charge, of which he was entirely innocent, he being at the time of the commission of the supposed crime in the city of San Francisco, California, and was sentenced upon such conviction to imprisonment in the state prison at Jackson for the term of five and one-half years; and *Whereas*, he served upon such sentence over a year and one month before it was demonstrated that he was innocent of such offense, and received a full and unconditional pardon by the late Governor Winans; and *Whereas*, great injustice was done said Allen by reason of such arrest and imprisonment in the county jail of Mecosta county, trial, sentence, and imprisonment in the state prison, for which he should receive compensation: Therefore be it *Resolved* by the senate and house of representatives of the State of Michigan, that the board of state auditors shall investigate the claim of said Thomas Allen as set forth in the above preamble, and if, in the judgment of the board, the facts set forth are true, the board of state auditors are hereby authorized and empowered to audit and allow the said Thomas Allen, his heirs or assigns, a sum not to exceed ten dollars per month for a period not to exceed ten years from and after the passage of this joint resolution; and the board of state auditors are hereby authorized to draw their warrant on the state treasurer for the payment of the same.

"This joint resolution is ordered to take immediate effect.

"Approved May 10, 1899."

On June 21st the above resolution was presented to the board of state auditors, and the board refused to consider the claim. Petitioner then presented to this court his petition for the writ of *mandamus* to compel action on the part of the board.

This resolution is a most remarkable one. Nine years after conviction and sentence, the legislature, without an investigation, asserts in the preamble that the petitioner was entirely innocent of the crime for which he was convicted; that, instead of being in Michigan at the time of the commission of the crime, he was in California; that it was demonstrated, after serving a year and one month, that he was innocent; and then authorizes the board to allow him \$10 per month for a period not exceeding 10 years.

1. The first and most important question presented is, Has the legislature the power and authority to establish a court of appeals, aside from constitutional courts, to determine the guilt or innocence of a convicted criminal? Petitioner had his day in court, was defended by counsel, was given an opportunity to introduce testimony, and, in brief, was furnished all the safeguards which the Constitution throws around one charged with crime. He was convicted. He did not appeal. Presumably, there was no error upon the trial. Nine years afterwards the legislature makes the board of state auditors an appellate court to determine whether he was guilty or innocent, and, if they should find him innocent, to allow him damages for the wrongful conviction and imprisonment. The preamble recites that his innocence was demonstrated, but to whom or how it was demonstrated is not stated. It is not stated that the governor pardoned him because he believed him innocent. The executive of the State is not made an appellate tribunal to determine that question. When one has been convicted and sentenced by a court of competent

jurisdiction, from which he takes no appeal, and has not been granted a new trial, the only method provided by our Constitution by which he can be relieved from the penalty imposed is by a pardon by the governor. The governor may pardon with or without good reason, with or without investigation. He is not limited by the Constitution to any reason for exercising the pardoning power. Consequently his act in pardoning and his reasons therefor have no bearing whatever upon guilt or innocence. The legislature possesses no authority to organize any tribunal for the trial of persons charged with crime other than the judicial ones authorized by the Constitution. The payment by the board is conditioned upon the establishment of his innocence, which means nothing less than a determination by this board that the court which tried him erred in its judgment, and that 12 men found him guilty upon false testimony, or for some reason erred in their conclusion. It is a violation of the plain provisions of the Constitution establishing courts, and conferring the exclusive jurisdiction upon them to try civil and criminal cases. Few criminals confess their guilt. The result of sustaining the validity of this resolution would be an open door for raids upon the public funds.

As already shown, the pardon is not essential to the maintenance of such claims, for the executive is not vested with power to review the judgment of courts. It would, therefore, result that, after a convict has served his sentence, 5, 10, 15, or 20 years after his conviction, he may go to the legislature, assert that he was innocent, that he can prove it, and it may be referred to the board of state auditors, or any other number of men, public officers or private citizens, to determine whether he had a fair trial and was properly convicted. Nor is this all, but every person who is arrested and acquitted may also make his claim against the State for the wrongful arrest and detention. If such persons, when the testimony in behalf of the people is gone, will pass upon and believe the testimony which an ex-convict can introduce, he may be

awarded such a sum out of the state treasury as the legislature may see fit to allow, or the persons to whom such power is delegated may allow. The bare statement of the proposition is enough to condemn it as unconstitutional, and bad in law, morals, and equity. It is unnecessary to hunt for authorities which condemn it.

2. The resolution authorizes the expenditure of the public moneys of the State for a purely private purpose. It is a mere gratuity, for which the State received nothing, but, on the contrary, incurred expense, by reason of his arrest, trial, and imprisonment. *Bourn v. Hart*, 93 Cal. 321 (15 L. R. A. 431, 27 Am. St. Rep. 203); *Conlin v. Board of Supervisors*, 99 Cal. 17 (21 L. R. A. 474, 37 Am. St. Rep. 17). Section 45, art. 4, of the Constitution, is as follows: "The assent of two-thirds of the members elected to each house of the legislature shall be requisite to every bill appropriating the public money or property for local or private purposes." The resolution did not receive a two-thirds vote of the members of the senate. This provision is mandatory, and cannot be evaded by calling a bill a "joint resolution." The above provision of the Constitution is too clear and too valuable to be thus frittered away. *Burritt v. Commissioners of State Contracts*, 120 Ill. 322; Cush. Law & Pr. Leg. Assem. 930.

3. Section 4, art. 8, of the Constitution, provides that "the secretary of state, state treasurer, and commissioner of the state land office shall constitute a board of state auditors to examine and adjust all claims against the State not otherwise provided for by general law." The jurisdiction conferred upon this board by this provision of the Constitution clearly means *claims* resting upon some legal basis. "Claim" is defined to be "a demand of a right or alleged right; a calling on another for something due or asserted to be due; as, a claim of wages for services." Cent. Dict. The legislature can only authorize this board to pass upon claims such as are contemplated by the Constitution. It cannot authorize the board to

consider requests, petitions, or claims for appropriations which are merely gratuities, or which may be based upon sentimental or moral grounds. It is conceded by counsel for petitioner that he has not the semblance of any legal claim. The sole apology offered for such resolution is that it is based upon sentimental or moral grounds. Fortunately, the people, through their Constitution, have closed the door to such sentimental and unjust claims. The people, through their Constitution, have committed to the courts the sole jurisdiction to try persons charged with crime, and have made their judgments final, and have also prohibited their public funds to be squandered in mere gratuities of this character.

The writ is denied.

The other Justices concurred.

MASON v. HOWES.

122 329
e139 388

1. LANDLORD AND TENANT—COVENANT TO REPAIR—LEASE FROM MONTH TO MONTH.

That a lessee from month to month continues to occupy the premises for more than one month after the landlord's refusal or neglect to make promised repairs does not make his holding a new one, independent of the terms of the original tenancy, so as to relieve the landlord from liability for damages thereafter arising from the defective condition of the premises.

2. SAME—CONTRIBUTORY NEGLIGENCE.

A tenant who remained in leased premises after knowledge that the plastering was defective, and that some of it had fallen, was not guilty of contributory negligence, precluding a recovery from the landlord of damages resulting from falling plaster after he had promised to make all necessary repairs where she had had no previous experience with defective plaster, and was acting in the belief that the

landlord would tear off the defective plastering if it was dangerous.

8. SAME—BREACH OF COVENANT—DAMAGES.

A landlord who agrees to make necessary repairs for the tenant, and afterwards knowingly leaves the plastering in a defective condition, is liable for damages to her stock of goods caused by fire from a lamp upset by falling plaster.

Error to Calhoun; Smith, J. Submitted November 14, 1899. Decided December 12, 1899.

Assumpsit by Alice Mason against George E. Howes, trustee of the estate of Clement Wakelee, deceased, for the breach of a covenant to repair leased premises. From a judgment for plaintiff, defendant brings error. Affirmed.

Hulbert & Mechem, for appellant.

Howard W. Cavanagh, for appellee.

MOORE, J. Plaintiff was for some years the tenant of defendant, occupying as a millinery shop and residence a suite of rooms in the Wakelee Block. The arrangement was made through Mr. Wakelee, the agent of defendant. It was her claim that defendant was to keep the premises in repair, that he failed to do so after his attention was called to the necessity of making repairs, and that because of his negligence a quantity of plaster fell from the ceiling, injuring her goods, and upon another occasion upsetting a lamp and setting fire to her goods. Her declaration has several counts, in which she claimed, not only general damages, but special damages. The counts set up in great detail her claims. Her rent was payable monthly. The defendant denied any promise to keep the premises in repair. From a judgment obtained by the plaintiff in a trial before a jury, defendant has brought the case here by writ of error. There are 22 assignments of error in the case. We do not deem it necessary to discuss all of them.

It was claimed in the court below, and is claimed here, as follows:

“Even if Mr. Wakelee, as the agent of defendant, in April, 1889, agreed to make repairs, that agreement could not be carried along and held operative for any period longer than a month from the time when he had been requested to make repairs, and refused or neglected so to do. By continuing to occupy the premises after such refusal or neglect on the part of the landlord, a new holding and agreement is made between the parties. The term of the lease at any one time cannot be considered as extending more than one month. The duties and obligations of the parties that they have in contemplation when they enter into such an agreement cannot be considered as extending for a longer time than that term.”

No authority is cited in support of this proposition, and it would be very strange if one could be found. The parties had a right to make such a contract as they saw fit, and it would be anomalous indeed if one of the parties, by breaking his contract, could by that act make a new and different one, more favorable to himself.

It is urged, because plaintiff knew of the defective condition of the plaster, that by remaining in the premises she was guilty of contributory negligence, and assumed the risk, and cannot recover; citing *Town v. Armstrong*, 75 Mich. 580, and other cases. In the case of *Town v. Armstrong*, by the showing made by the plaintiff she went into a dangerous place, fully aware of the risk she was taking, and for a trifle. The court very properly held that she could not recover. In this case the plaintiff claimed that, while she knew the plaster was defective, she did not know it was dangerous. She gave testimony tending to show that the trouble with the plaster was that no hair was used in the making of it, and that it was rotten and would not cling to the lath. She testified, among other things:

“I never had any experience with plaster before this time; never had anything of the kind to contend with. I thought I would draw his attention to it, if he thought it

was necessary. He was the judge. He was the landlord, and I rented of him, and paid my rent, and I left it to his knowledge as to whether it was best to tear it off or not. * * * I left it to Mr. Wakelee's judgment. If I had known this plaster was in a dangerous condition, I would not have stayed there. * * * I supposed it was safe when I called his attention to it."

And again:

"Q. I will ask you whether at the time you say you noticed something about this plastering, and called Mr. Wakelee's attention to it, whether or not the statement and act of Mr. Wakelee in permitting it to remain as it was allayed your suspicions, and threw you off your guard, as to the plaster being dangerous.

"A. It did; it threw me off my guard. I thought if it was dangerous he would have it taken off, as he attended to all such business.

"Q. I will ask you whether, relying on his statement of what he said about it, and his action in the matter, you went on believing you were safe in so doing. * * *

"A. I did; I thought I was safe in doing so; we allowed him to be the judge."

Under such circumstances, we do not think it can be said that, because plaintiff remained in the building after she knew that some of the plaster had fallen, she was guilty of contributory negligence, so that she cannot recover from her landlord for a breach of his agreement to repair.

The remaining question calling for attention relates to the question of damages. The court was requested to charge the jury as follows:

"The only damages which can be recovered by the plaintiff are such as the parties are presumed to have contemplated from the agreement they made. The tenancy being at will, the parties cannot be presumed to have assumed any risk for a longer period than one month; and the plaintiff, if dissatisfied with the condition, could repair the plastering herself, and charge the expense to the landlord, or could terminate the tenancy; and she could do the latter at any time, if in fact the condition of the premises was such as to render them dangerous. The damages

which the plaintiff can recover, if entitled to any, are to be determined by ascertaining how much less the rental value of the premises was with the plastering in an unsafe condition than it would be if the repairs had been made as agreed. These damages cannot exceed one month's rent, unless the jury should find that the rental value of the premises in good condition would actually exceed the rent charged and paid."

He refused to so charge, and instructed the jury as follows:

"I instruct you that the measure of damages, which is one for a breach of the covenants of this lease, that the plaintiff, if you find that she is entitled to recover, can recover such damages as are shown to be the legal and approximate consequence of the breach complained of, and such damages as can be presumed to have been anticipated by the parties at the time of making the contract. But these damages can be no more than are shown to have directly and immediately followed from the acts of the defendant complained of. Loss of profits which the plaintiff might have made except for the interference with her business are too remote and speculative, and you should not consider them in determining the amount of the damage."

I do not see how this contract differs from any other. It is not a case where the tenant has agreed to make repairs. Here the landlord has agreed to do so, and has failed. I do not see why the landlord should not be liable for a breach of his contract, just as any other person who was a party to a contract would be. Where he has violated his contract, he should be liable for all the injuries resulting therefrom. *Stevens v. Pantlind*, 95 Mich. 145; *Culver v. Hill*, 68 Ala. 66 (44 Am. Rep. 134); *Watson v. Hooton*, 4 Ill. App. 294; 2 Wood, Landl. & Ten. (2d Ed.) § 400. See *Maywood v. Logan*, 78 Mich. 135 (18 Am. St. Rep. 431).

The judgment is affirmed.

The other Justices concurred.

122	334
122	570
122	384
127	57
122	384
81NW	112
122	334
140	31
122	334
142	192

MOUAT v. MONTAGUE.

WRITTEN CONTRACTS—TERMS—PAROL EVIDENCE.

A contract in writing, complete upon its face, for the installation of a heating apparatus, guaranteed to warm a dwelling to a specified temperature, cannot be varied by parol evidence that it was based on the owner's statement and understanding that he would build a stone wall under the building to be heated.

Error to Wayne; Hosmer, J. Submitted November 15, 1899. Decided December 12, 1899.

Assumpsit by John D. Mouat against Charles Montague to recover a balance claimed to be due upon a contract to install a heating apparatus. From a judgment for defendant on verdict directed by the court, plaintiff brings error. Affirmed.

Wisner & Harvey, for appellant.

Stevenson, Merriam, Eldredge & Butzel, for appellee.

HOOKER, J. The parties to this action negotiated a contract, which they attempted to put in writing, in the form of a proposal and acceptance, whereby the plaintiff promised "to erect in a building located at Caro, Michigan, a hot-water heating apparatus," according to specifications which followed. It contained the following guaranty:

"We hereby guarantee the heating apparatus, when completed, to warm the rooms as mentioned in accompanying schedule to 70 degrees at zero weather."

Also the following provision:

"Upon notification from us that the work herein specified is completed, it shall be inspected by owner or his agent, and accepted or rejected, so that the work, if un-

satisfactory, can be changed and finished at once; and written acceptance is requested when work is complete. I hereby agree to furnish the herein-specified heating apparatus for the sum of \$625.00, payable as follows: Cash 30 days from completion of job. We respectfully submit this proposal subject to your acceptance 30 days from date."

To this proposa. was appended an acceptance, viz. :

"*Gentlemen:* We hereby accept and agree to the terms and conditions of your proposal as above specified and submitted, and you are hereby authorized to commence work on or before December 5, 1892.

"CHARLES MONTAGUE."

A schedule was attached, giving names and dimensions of rooms, indicating that the building was designed for a dwelling, and sizes of radiators.

The work was done about January 1st, and was partially paid for, \$125 only of the contract price being unpaid. This action was brought to recover such sum, with interest; the declaration being the common counts, to which a plea of the general issue and a notice of recoupment were interposed. A bill of particulars filed by plaintiff consisted of a claim for the contract price, less payments. Upon the trial the plaintiff sought to show that the proposal was based upon defendant's statement and understanding that he should build a stone wall under the house. This was excluded upon the ground that the writing could not be varied by parol testimony. A verdict for the defendant was rendered by direction of the court. These two rulings are the errors relied upon. The case is ruled by *McCray Refrigerator Co. v. Woods & Zent*, 99 Mich. 269 (41 Am. St. Rep. 599), and does not fall within the rule of *Stahelin v. Sowle*, 87 Mich. 124, which followed a doctrine well established, viz., that, where a writing shows upon its face that it does not contain the entire agreement, parol evidence is admissible to prove the contract.

The judgment is affirmed.

The other Justices concurred.

RICABY v. GENTLE.

LIMITATIONS—REMOVAL OF BAR—NEGLIGENCE OF OFFICER.

When, through a sheriff's failure to make return of a summons in due season, a suit is abated, the plaintiff may commence anew at any time within a year, though the statute of limitations has in the meantime run against the claim; 3 Comp. Laws 1897, § 9738, giving a plaintiff such right where the original writ fails of a sufficient return "by any default or neglect of the officer to whom it is committed."

Error to Berrien; Coolidge, J. Submitted November 15, 1899. Decided December 12, 1899.

Assumpsit by Robert Ricaby against Samuel Gentle upon a justice's judgment. From a judgment for plaintiff, defendant brings error. Affirmed.

This case was tried before the court without a jury, and the following findings made:

"FACTS.

"A valid judgment was obtained by the plaintiff against the defendant, before Alonzo Plummer, a justice of the peace, on September 7, 1888, for the sum of \$290.36 and costs of suit, taxed at \$3.20. On August 23, 1894, a summons was issued out of this court in favor of the plaintiff and against the defendant, returnable October 9, 1894, and placed in the hands of the sheriff for service on the day of issue. In July, 1894, Gentle went to Europe on business matters, and did not return to this country till October 11, 1894. He was gone less than three months. His residence has been in Benton Harbor, in this county, since July, 1872. The return of the sheriff to the first summons was made November 27, 1894. This return recites that he was unable to obtain service of the summons on the defendant, Gentle, within the lifetime of the summons. The return was filed with the clerk of this court November 27, 1894. On the same day, November

27, 1894, a new summons, purporting to be an *alias* summons in favor of the plaintiff and against the defendant, was issued out of this court, and personally served by the sheriff on the defendant, Gentle, December 3, 1894. The declaration was filed on December 11, 1894, and plea subsequently entered. Nothing has ever been paid on the judgment.

“LAW.

“I find as conclusions of law :

“1. That it was the duty of the sheriff to make return of the original summons on its return day, October 9, 1894, and that as he did not make return till November 27, 1894, he was guilty of neglect, within the meaning of section 8723, 2 How. Stat.

“2. I find that, as 47 days elapsed between the return day of the original summons and the issuing of the alleged ‘*alias*’ summons, that the continuity of action was broken, and that the first action was abated.

“3. I find that, as the plaintiff commenced his new action immediately upon the return of the original summons, he was not guilty of neglect; that he did all that the law required of him; and that the original action abated, not because of any neglect or delay on his part, but on account of neglect of the sheriff in not making his return.

“4. I find that the service of the ‘*alias*’ summons was the commencement of a new action within one year after the abatement of the first action; that such abatement was caused by insufficient return of the sheriff to the original summons, by negligent failure to make return thereof before November 27, 1894, and on account of ‘matter of form.’

“5. I find that the plaintiff is entitled to recover judgment against defendant, Gentle, for the amount of the original judgment rendered September 7, 1888, with interest at 7 per cent. thereon, amounting in all to \$516.60, with costs of suit.”

Andrews & Murdoch (N. A. Hamilton, of counsel),
for appellant.

George W. Bridgman, for appellee.

PER CURIAM. The provisions of the statute are as follows (3 Comp. Laws 1897, § 9738) :

"If, in any action duly commenced within the time limited in this chapter and allowed therefor, the writ or declaration shall fail of a sufficient service or return by any unavoidable accident, or by any default or neglect of the officer to whom it is committed, or if the writ be abated or the action otherwise avoided or defeated by the death of any party thereto, or for any matter of form, or if, after a verdict for the plaintiff, the judgment shall be arrested, or if a judgment for the plaintiff shall be reversed on a writ of error, the plaintiff may commence a new action for the same cause at any time within one year after the abatement or other determination of the original suit, or after the reversal of the judgment therein; and if the cause of action does by law survive, his executor or administrator may, in case of his death, commence such new action within the said one year."

The court found that the officer was guilty of negligence in not returning the original summons. This being so, the statute would be meaningless unless the judgment were sustained. We think the court arrived at the correct conclusion, and the judgment is affirmed.

HULL v. HULL.

1. WILLS—CONSTRUCTION—DUTY OF EXECUTORS.

Under a will devising property to testator's wife "during her natural life; that is to say, that she shall have it as needed for her support and comfort," with remainder to testator's heirs, and nominating the wife and a nephew as executors, the nephew being requested to "continue right along as executor," to see that the will is carried out, and to settle the business after the death of the wife, and requiring each to give bonds, the wife to the amount of one-half, the nephew to the full amount, of the estate,—the wife is not entitled to the exclusive possession of the property during her lifetime, but only to a joint possession with her co-executor, with the duty resting on them to transfer to her such of the principal

122	338
f125	659
122	338
127	123
127	124
122	338
128	513
122	338
s81W	89
122	338
s81W	89
f132	1444
122	338
p149	501
p149	506
f150	633

as may be needed for her support and comfort, should the income from the estate at any time prove insufficient for that purpose.

2. SAME—JURISDICTION OF PROBATE COURT.

Under such a will the probate court has no jurisdiction, unless the executors disagree, to assume the function delegated to them of determining the amount to be paid to the wife.

Appeal from Eaton; Smith, J. Submitted November 15, 1899. Decided December 12, 1899.

Bill by Margaret A. Hull, executrix of the last will and testament of Tyler Hull, deceased, against John Hull, her co-executor, Whitman Hull, and others, for a construction of said will. From the decree rendered, complainant appeals. Modified.

The purpose of this bill is to obtain a construction of the last will and testament of Tyler Hull, deceased. Mr. Hull left a widow, but no children. The provisions of the will necessary to state are these:

"My will is that, after my debts shall be paid and a monument purchased, as above provided, that the remainder of my property shall go to my wife, Margaret A. Hull, during her natural life; that is to say, that she shall have it as needed for her support and comfort; and this to include all my property, both personal and real, of whatever kind or nature. After the death of my wife, the remainder of my property shall be divided among the heirs of my blood as follows: * * * I do hereby nominate and appoint my wife, Margaret A. Hull, and my nephew John Hull, son of my deceased brother, John Hull, to execute this will; and I request the said John Hull, my nephew, to continue right along as executor, and that he shall see that the whole of this will is carried out to the letter, and that he shall settle the whole business after the death of my wife. My will is that my wife shall give bonds to the one-half of the amount of the estate, and that John Hull shall give bonds as executor to the full amount of the assets of the estate."

The monument was erected and the debts paid.

Complainant contends that she is entitled to the posses-

sion and control of the remainder of the estate during her life, to be used by her, principal and income, for her support and comfort, and that at her death the remainder will go to the other legatees. Defendants contend that she is only entitled to what is reasonably necessary for her support and comfort, and that the executors should retain possession and control of the estate. The court below decreed that:

"It is further decreed that the testator, by his said will, did not intend to give to Margaret A. Hull, his widow, the absolute control of his property, but intended that she should be so well cared for as to have her support and live in comfort; and that the probate court for the county of Eaton is the best and proper tribunal to fix the amount necessary to carry out the testator's intention in this regard."

We quote further from the decree:

"That the estate shall be handled by the executrix and executor named in the will, who shall file their annual accounts from time to time with the probate court, and that the probate judge make an order as to the payment, by the executor and executrix, to the widow, of a certain amount per year, payable either quarterly, half-yearly, or yearly, as, in the judgment of the probate court, seems best; and that in that way this allowance to the widow can be increased or decreased by the probate court as exigencies may require."

The court further decreed:

"That the testator intended that the house and personal property in it and around it should go to his wife, to use in such a way that it would aid her in her support and comfort."

No contest is made over this provision of the decree.

John M. Corbin, for complainant.

Huggett & Smith, for defendants.

GRANT, C. J. (*after stating the facts*). Counsel do not disagree about what the complainant is entitled to re-

ceive from the estate. They concede that the word "comfort" means more than "support," and includes "whatever is requisite to give security from want, and furnish reasonable physical, mental, and spiritual enjoyment." They concede that she is not limited to the income from the estate, but is entitled to encroach upon the principal in so far as it may be needed for her support and comfort. The sole question of dispute is, How, when, and by whom shall it be determined what is "needed for her support and comfort?" There is no express provision in the will upon this point. The learned counsel for complainant contends that when the executors had erected the monument, and paid the debts and expenses of administration, the remainder should be turned over absolutely to the possession of the widow, to be used by her for her support and comfort, without distinction as to the use of principal and income, and that she is the sole judge of her needs. If this be so, then the duty and authority of the complainant as executrix would cease from the time that she and her co-executor thus turned the property over to her and filed their account with the probate court. It would also follow that the duty and authority of her co-executor was suspended from that time until her death, when it would be his duty to take possession of what property she had left, and see to its distribution. This, clearly, would be in direct violation of the will, which makes it the duty of her co-executor "to continue right along as executor, and to see that the whole of this will is carried out to the letter." Counsel for complainant asserts that she and her bondsmen would be liable for any misuse of the property during that period. This amounts to a concession that she is still acting as executrix, for her bondsmen are only liable for her acts as executrix, and not for her acts as legatee. If she be liable as executrix, then her co-executor is also liable, for he is required to act right along with her. The fair construction of this will is that the testator placed this property under the control of his executors and trustees during the lifetime of the complainant, to see that its provisions,

made for her support and comfort, be carried out. The will neither expressly nor impliedly requires her to apply to the probate court for the authority to use any of the principal for her support and comfort, nor does it confer upon that tribunal the authority to determine her needs. The probate court has no jurisdiction over such matters, unless it is conferred by the will. She is only authorized to have it as needed for that purpose. There must be some authority to determine when it is needed. This authority is not conferred upon her. The clause appointing his executors is, we think, sufficiently clear to show the intention of the testator upon this point. He appointed his wife and nephew his executors, directing them to carry out his will to the letter, and clearly contemplates their continuance in that capacity until the death of his widow. One of the duties imposed upon them by the will is to transfer to her, at any time when the income is not sufficient, such of the principal as, in their judgment, may be needed for her support and comfort. Both have given bonds for that purpose, and are liable only for an abuse of the trust reposed in them. They should from time to time, as required by law, file their accounts for allowance by the probate court. Should the executors disagree as to the amount needed, undoubtedly either party might apply to the proper court to determine the question. It seems highly improbable, however, that any such exigencies will arise, for all the parties interested are evidently disposed to act in a spirit of fairness and good will, and to carry out the wishes of the testator as expressed in his will.

The decree will be modified in accordance with this opinion. No costs will be allowed to either party.

The other Justices concurred.

PATTERSON v. KENNEDY.

1. LAW OF FOREIGN JURISDICTION—SUMMONS—SERVICE BY INFANT
—LEGALITY—HOW SHOWN.

In the absence of reported cases showing the law of a foreign jurisdiction respecting the validity of a service of summons by an infant, such service may be upheld in our courts, in an action on a judgment rendered in such jurisdiction, upon the testimony of an attorney there residing that it accords with the common practice.

2. SAME—DIRECTING VERDICT—APPEAL—REVERSAL.

On plaintiff's appeal from a judgment for defendant on verdict directed by the court, where it appears that there was testimony entitling him to go to the jury, on the main point in controversy, the court will not feel constrained to affirm the judgment because of a defect in the proofs which might have been supplied had attention been called to it at the trial. So *held* where the action was on a foreign judgment, the entry of which was signed by a person a "clerk," when the rule of practice in the foreign jurisdiction required such entries to be signed by a register, local register, deputy register, or deputy clerk of the crown, and the variance was first suggested on appeal.

Error to Wayne; Aldrich, J., presiding. Submitted November 16, 1899. Decided December 12, 1899.

Assumpsit by James C. Patterson and others against Thomas J. Kennedy upon a foreign judgment. From a judgment for defendant on verdict directed by the court, plaintiffs bring error. Reversed.

Walters, Humphrey & Walters, for appellants.

Edwin Henderson, for appellee.

MONTGOMERY, J. This was an action on a judgment entered in the county court of the county of Essex, in the province of Ontario. The judgment was entered by the clerk under authority of rules of practice obtaining in

Ontario, which were adopted by statutory authority. The plaintiffs gave in evidence this judgment, and also called as a witness John Angus Campbell, who testified that he served the summons in the original case, and made affidavit of service, and that at the time of such service he was of the age of 19 years. The defendant testified that no such service was made upon him, and that he was not at the time of the purported service a resident of or in Essex county. The circuit judge withdrew all questions of fact from the jury, and directed a verdict for the defendant, on the ground that the service of the summons in the original case by a minor was invalid, and that the Canadian court obtained no jurisdiction of the defendant.

Plaintiffs called as a witness Mr. John L. Murphy, a barrister and solicitor engaged in practice in Windsor, who testified that, under the practice in Ontario, a service of a summons may be made by any literate person of sufficient discretion, and that there is no requirement, either by statute or in practice, that the service of process be by one above the age of 21. A criticism is made of this testimony on the ground that no reported Canadian case is introduced or cited showing that the practice is as stated. We are not prepared to say, however, that a continued practice may not be considered as establishing the rule in a particular jurisdiction, in the absence of any adverse holding. The testimony of the witness at least tended to show that the service of this writ was within the practice, and no Canadian case is cited condemning such practice. The rule of the common law has been differently interpreted in the various courts of the United States. In Connecticut and Vermont the courts have adopted the rule contended for by the defendant. *Tyler v. Tyler*, 2 Root, 519; *Harvey v. Hall*, 22 Vt. 211. In New Hampshire, Kansas, and South Carolina the rule contended for by plaintiffs prevails. *McCracken v. Todd*, 1 Kan. 169; *Moore v. Graves*, 3 N. H. 408; *Bell v. Pruitt*, 51 S. C. 347. See, also, 1 Tidd, Prac. 168. Without deciding which rule should be adopted in this case, we hold that

the testimony tending to show a course of practice in the Canadian courts which recognizes the validity of a service by an infant is competent, and that the present case should have gone to the jury.

The point is made by the appellee that the judgment was not attested by the proper officer. The rule of practice obtaining in Ontario provides that the judgment shall be drawn up and signed by a register, local register, deputy register, or deputy clerk of the crown. The entry in this case is signed by "Frank E. Marcon, Clerk." Mr. Marcon was called as a witness, and testified that he was, at the time of testifying, a deputy clerk of the crown, clerk of the county court, etc. It is, perhaps, not an unfair inference that, as deputy clerk of the crown, he is *ex officio* clerk of the county court. However this may be, it does not appear that this criticism of the judgment was made on the trial, and we are not disposed to deprive the plaintiffs of their opportunity to be heard in the circuit on this question. If there be a defect in proof simply, it can be supplied on a new trial, as might have been done on the first trial if attention had been called to the alleged defect. *Findlay v. Railway Co.*, 106 Mich. 700.

Judgment is reversed, and a new trial ordered.

The other Justices concurred.

HUME v. MASON & HOGE CO.

1. TRIAL—ORDER OF PROOF—DECLARATIONS OF AGENT—AUTHORITY—ERROR WITHOUT PREJUDICE.

While the practice of permitting testimony of acts and directions of a supposed agent, before proving the authority, is to be condemned, a judgment will not be set aside because such testimony was admitted and the authority not shown, where, in view of instructions to the jury to disregard the testimony, there is no reason to believe that it was prejudicial.

2. SAME—CONDUCT OF COUNSEL—IMPROPER REMARKS.

A judgment will not be reversed for improper remarks of counsel, where it appears that they were promptly ruled out by the court, and the counsel reprimanded for making them.

Error to Chippewa; Steere, J. Submitted November 17, 1899. Decided December 12, 1899.

Case by Samuel Hume against the Mason & Hoge Company for personal injuries. From a judgment for plaintiff, defendant brings error. Affirmed.

The defendant is a corporation, and was engaged as contractor in digging a canal for the American Lake Superior Power Company at Sault Ste. Marie. Plaintiff was a common laborer, engaged with others in shoveling the dirt from the sides of the canal onto dump cars. He commenced work on the 12th day of January, 1899, and was injured on the 14th. The ground was frozen to a depth of about two feet. This frozen surface had previously been blown to pieces with dynamite. The sides of the bank underneath the frozen top were not frozen. The bottom was very muddy, and, the soil being part clay, their feet stuck in it. It was customary to blast down the frozen top of one bank while the men were at work upon the other. On the day of the accident, the defendant had abandoned the use of dynamite, and had placed laborers

where plaintiff was at work, with picks, sledges, and wedges, to wedge off the frozen crust. While they were engaged in this work, a portion of the bank underneath the frozen top came down, and, before the plaintiff could escape, fell upon him and broke his leg. The claim of the plaintiff is that it was negligent to place men above to work upon the frozen ground while the shovelers were at work underneath; that the jar thus caused would tend to cause the dirt underneath to cave off. The testimony on the part of the plaintiff also tends to show that he had no knowledge that any one was at work above. One Whiteman was the foreman of the working gang, and one Hanger was the defendant's superintendent. There was a sharp conflict of testimony on all the material points. Plaintiff recovered a verdict of \$1,000.

Lawson C. Holden (M. F. McDonald and John W. Shine, of counsel), for appellant.

John P. Conrick (Warner & Sullivan, of counsel), for appellee.

GRANT, C. J. (*after stating the facts*). 1. Plaintiff was permitted, under objection and exception, to introduce testimony of statements made by Foreman Whiteman tending to show that he knew of the danger in putting the men to work in this place before the frozen earth was caved off. Plaintiff's counsel was permitted to introduce this testimony upon the statement that he would show that Whiteman had authority to bind the defendant, and was not a mere fellow-workman of the plaintiff. Plaintiff failed to show this, and the court instructed the jury that Whiteman was a fellow-servant, and that defendant was not responsible for his conduct or statements. It is now urged that this testimony was prejudicial notwithstanding the instruction. The case was submitted to the jury upon the theory that Mr. Hanger had authorized the work upon the frozen ground above, and that this caused the dirt underneath to cave.

There was testimony to sustain this theory. A motion for a new trial was made, and, in disposing of it, the circuit judge said that the jury was composed of very intelligent men, and that, in view of the small amount of the verdict, the jury, in his opinion, were not prejudiced by the testimony. In this view we concur. There is no possible ground for believing that the jury did not follow his instructions as to nonliability for the acts of White-man. Besides, one of the conversations testified to took place in the presence of Hanger, and was apparently ratified by him. The practice of permitting testimony of acts and directions of the supposed agent, before proving the authority, is to be condemned. The authority ought first to be shown. But verdicts will not be set aside by appellate courts for this reason unless there is reason to believe that the jury were prejudiced thereby.

2. Complaint is made of the conduct of counsel for the plaintiff upon the trial, in offering testimony, and the remarks made during the argument. What these remarks were, only appears in an affidavit made by counsel for defendant in the motion for a new trial. The judge certified that the testimony offered was promptly ruled out, and counsel promptly stopped in his argument, and reprimanded for the use of the language complained of. Under this state of facts, the judgment will not be reversed.

We find no reversible error in the record. Judgment affirmed.

The other Justices concurred.

FOLEY v. COMSTOCK.¹

1. INTEREST—METHODS OF COMPUTATION—PARTIAL PAYMENTS.

In an action to recover an alleged overcharge of interest upon notes on which partial payments were made from time to time, error in permitting plaintiff's witness to place before the jury, over defendant's objection, a computation made on a basis not approved in this State, will be *held* prejudicial, though the court, in its final instructions, correctly stated the Michigan rule, unless it clearly appears from the verdict that it was not affected thereby.

2. SAME—SPECIAL AGREEMENT.

An agreement to allow interest on payments on a note until fully paid means only that interest shall cease from date of payment.

3. CONTRACTS—DURESS—EVIDENCE.

Under a claim that plaintiff's contract to pay a certain amount for sawing lumber was made under duress, he should not be allowed to testify that he could have had it sawed for a certain less amount, there being no evidence tending to show legal duress.

4. TRIAL—EXCEPTIONS—IMPEACHMENT OF WITNESSES.

Where defendant objected to impeaching testimony's being received unless his witness should be recalled, and his attention directed to the conversation by which he was sought to be impeached, and plaintiff's counsel thereupon stated that, if necessary, he would recall the witness, which the court said might be done after the impeaching witness was through, and defendant accordingly held his exception until, by plaintiff's calling a third witness, it was evident that the omission was not to be supplied, his exception then taken should be treated as covering the original ruling.

Error to Alpena; Kelley, J. Submitted November 17, 1899. Decided December 12, 1899.

Assumpsit by Nicholas J. Foley against Andrew W.

¹ Rehearing denied February 7, 1900.

Comstock and another for the breach of a lumber contract. From a judgment for plaintiff, defendants bring error. Reversed.

Joseph H. Cobb, for appellants.

J. D. Turnbull (*L. G. Dafoe* and *A. E. Sharpe*, of counsel), for appellee.

MONTGOMERY, J. This action was in *assumpsit* for breach of a contract. The declaration contains a special count averring that the defendants undertook to manufacture and pile certain lumber for the plaintiff in proper manner; that defendants, in performing such undertaking, destroyed large portions of the lumber by cutting the same into slabs and worthless lumber; and that it was improperly piled, so as to become stained. The declaration also contains the common counts in *assumpsit*. It appeared by the testimony of the plaintiff that the defendants, beginning in 1892, loaned him money from time to time on the security, in part, of a real-estate mortgage dated December 12, 1892, consideration of which was \$30,000, which recited that it was given to secure the payment of money then owing to the defendants, and also to secure the repayment of such further advances as defendants should make, up to the amount stated. It provided that "all money so advanced shall be evidenced by certain promissory notes bearing interest at seven per cent. per annum, and all said notes shall be made payable within one year from the date thereof." Notes were given after this date for advances, running, one two months, one three months, one five months, and one six months. Payments were made upon these notes from time to time. One of the plaintiff's claims was for the alleged overcharge of interest on these notes. The plaintiff recovered a verdict of \$8,040.33, and defendants bring error.

The rulings complained of are of two classes: (1) Such as affect the plaintiff's claim to recover interest money claimed to have been improperly exacted from him; and

(2) such rulings as affect his right to recover damages for the improper manufacture and piling of the lumber.

1. The court, in the final charge to the jury, appears to have correctly stated the rule as to the computation of interest laid down by this court in *Wallace v. Glaser*, 82 Mich. 190 (21 Am. St. Rep. 556); but evidence had been admitted of a computation made on an entirely different basis, and the court had stated in the presence of the jury that the defendants were not entitled to charge plaintiff "interest on 90-day installments,—short interest." This ruling was based on a construction of the original security contract, by which it was provided that the money advanced should be evidenced by promissory notes bearing interest at 7 per cent. per annum, and all of said notes, with the renewals thereof, should be made payable within one year from the date thereof. We think this ruling was erroneous. The parties themselves, by the giving by the plaintiff and acceptance by the defendants of notes running a less time than one year, placed their own construction upon the phrase "payable within one year from the date thereof," descriptive of the notes to be given. The injustice of the method of computation adopted by plaintiff's witness may be illustrated by an example: One of the notes made by plaintiff was dated November 22, 1893, due six months after date, and was for \$11,900, with interest at 7 per cent. On June 27, 1894, a payment of \$499.28 was made, which, it will be seen, was the amount of interest due. By the computation given to the jury by this witness, plaintiff was allowed interest on this payment of interest up to the date of final adjustment, which amounted to \$120.60, yet he had not paid the interest on his note a day earlier than he had agreed to do. The injustice of this method is apparent. It is true, plaintiff testified to an agreement to allow him interest on payments on a note that was not all paid, but this would mean no more than that interest would cease from the date of payment. As it is not clear that the ruling above referred to did not affect the verdict, we

must regard the error as mischievous. Plaintiff's counsel, however, state that, rather than suffer a reversal on this ground, they are willing to consent to a reduction of the judgment. It becomes necessary, therefore, to consider whether there was error affecting the other branch of the case.

2. It appears that the contract between the parties for the manufacture of the lumber in question was written, and provided for payment by plaintiff of a saw-bill of \$2.50 per 1,000, and in 1894 of \$2.75 per 1,000. Plaintiff, under a claim that the contract was made under duress, was permitted to testify that he could have had the lumber sawed for \$2.35. There was no testimony offered which tended to show legal duress. No attempt has ever been made to rescind. On the contrary, this contract has been fully performed, and the saw-bill paid by plaintiff's notes from time to time. The circuit judge, in his charge, instructed the jury that the defendants were entitled to the contract price. The testimony had undoubtedly served another purpose, however, and what the purpose was is too plain to require extended remark. The testimony should not have been received.

One Eales had been a witness for the defendants. Plaintiff called in rebuttal Robert Brabant, who was asked as to a conversation with Eales, and to state what it was. Defendants' counsel objected on the ground that Eales' attention had not been called to the subject. The court said, "I don't think it was." Plaintiff's counsel then said: "Well, if it is necessary, I can call him back. *The Court:* You may call him after you get through with this witness." The witness then detailed an alleged conversation with Eales, which would indicate that Eales was attempting to influence the witness in the matter of giving his testimony. After the witness left the stand, plaintiff's counsel called another witness, when the defendants' counsel interposed, and the following colloquy occurred:

"*Mr. Cobb:* Your honor, before you put Mr. Foley on

the stand, I insist on Mr. Eales being called back, in reference to this conversation with Brabant.

"*The Court*: Do you want to call him? Better wait until he gets through.

"*Mr. Cobb*: No; I made my objection that Mr. Eales' attention had not been called to that, and the court said that—

"*The Court*: Proceed with the examination of this witness.

"*Mr. Cobb*: Give me an exception."

Counsel for the plaintiff say that there was no exception to the giving of Brabant's evidence. We think it is but fair to defendants' counsel to treat the exception which he noted as covering the ruling. On assurance that the omission would be supplied, he held his exception in abeyance until it was manifest that the omission to call Eales' attention to the subject was not to be supplied, and then noted his exception. The necessity for calling Eales' attention to the subject is clear. *People v. Gallagher*, 75 Mich. 512; *Koehler v. Buhl*, 94 Mich. 496.

None of the other questions presented are likely to arise on a new trial, and do not call for discussion.

The judgment is reversed, and a new trial ordered.

The other Justices concurred.

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McPHERSON v. BRISTOL.

1. JUDGMENTS—JOINT DEFENDANTS.

Where, after a judgment against joint defendants, one defendant severs for the purpose of prosecuting a writ of error, and, upon a second trial, judgment again passes for the plaintiff, with no discontinuance as to the nonappealing defendant, the new judgment must be entered against both.

2. SAME—AMENDMENT—APPEAL.

Where judgment should have been entered against two joint defendants, but was, without objection below, entered against one only, the appellate court will treat it as having been entered against both, the trial court having authority to amend the judgment.

3. PARTNERSHIP—PURCHASE FOR NONTRADING FIRM—LIABILITY OF PARTNERS.

Express authority need not be shown in order to hold a member of a nontrading firm for the price of a horse purchased by his copartner, and necessary to the proper conduct of the firm business.

4. SAME—THEORY OF DEFENSE—RECOUPMENT—REQUESTS TO CHARGE.

Where a partner, sued on a debt contracted by his copartner, defends on the theory of nonliability, and fails to demand recoupment of damages, he cannot complain of a refusal to charge that proof that the property was of little value was competent as tending to show the seller's bad faith.

Error to Livingston; Smith, J. Submitted October 6, 1899. Decided December 21, 1899.

Assumpsit by William McPherson, Jr., and Alexander McPherson against John Bristol, impleaded with J. S. Day, upon a promissory note. From a judgment for plaintiffs, defendant brings error. Affirmed.

William P. Van Winkle and *W. E. Scott* (*Rollin H. Person*, of counsel), for appellant.

Louis E. Howlett and *Judd Yelland*, for appellees.

LONG, J. This is an action of *assumpsit*, the declaration containing all the common counts, with a copy of note attached. Defendants appeared separately, and filed separate pleas. Defendant Bristol, with his plea, filed an affidavit denying the execution of the note. Demand for bill of particulars was made, and, among other items set forth in the bill served, were:

"One promissory note, dated June 24, 1896, given by J. S. Day and John Bristol to C. L. Cook, or bearer, for \$200.

"Money loaned by C. L. Cook to J. S. Day and John Bristol, which account has been assigned to the plaintiffs."

The jury upon the first trial returned a verdict against both defendants, and judgment was entered thereon for the amount of the note and interest. Defendant Bristol alone appealed to this court, and the judgment was here reversed. 115 Mich. 258. The case has again been tried in the circuit, and a judgment given for plaintiffs; not, however, for the amount of the note, but for the purchase price of the horse which the note represented.

The facts are sufficiently set out in the former opinion, and only such further facts will be stated as are necessary to an understanding of the points now here involved. It was stated in the former opinion that the questions presented were:

"1. Was there a partnership in fact?

"2. If there was no partnership in fact, was there such a holding out to the world as to justify those dealing with the members in believing that such a partnership existed?

"3. If there was a partnership in fact, was it a trading or nontrading partnership?

"4. If there was such a holding out, was it a holding out of the firm which justified strangers in believing that authority existed to execute the note in question?"

This court then said:

"In nontrading firms one partner does not generally possess the power to bind the partnership by way of contracting debts and executing commercial paper. * * * The power to make commercial paper by a member of a

nontrading firm exists only when it is expressly conferred, or when the giving of the paper is necessary to carry into effect an original purpose for which the partnership was formed."

At the close of the testimony on the present trial, the plaintiffs asked the court to submit the following special questions to the jury, and they answered the same:

"1. Was there a partnership agreement of any kind existing during the years 1895 and 1896 between Mr. Day and Mr. Bristol?"

"A. Yes.

"2. If there was a partnership agreement existing between these parties, did that agreement contemplate that these parties should raise fruit for the market, buy and sell fruit for a profit, or to prepare produce for sale or market at a profit?"

"A. No.

"3. Did Mr. Bristol conduct himself, or knowingly permit Mr. Day to so conduct himself, prior to June 24, 1896, as to lead the people in general, and Mr. Cook in particular, to believe that a partnership agreement of a trading character existed between Mr. Day and Mr. Bristol?"

"A. No.

"4. If there was a partnership agreement of some kind existing between Mr. Day and Mr. Bristol, was the horse purchased of Mr. Cook, on or about the time it was purchased, reasonably necessary to carry on the business of the firm?"

"A. Yes."

Defendant submitted the following special questions, which were answered by the jury:

"1. Did John Bristol expressly authorize J. S. Day to execute the note in question?"

"A. No.

"2. Did John Bristol expressly authorize J. S. Day to borrow \$25 in money of C. L. Cook, and pledge the credit of said Bristol therefor?"

"A. No.

"3. Did John Bristol expressly authorize J. S. Day to purchase the horse of C. L. Cook, and pledge the credit of said Bristol therefor?"

"A. No.

"4. Was said \$25 necessary to carry into effect an original purpose for which the partnership then existing between Mr. Day and Mr. Bristol was formed?

"A. No.

"5. Was the horse purchased by Day of Cook necessary on the 24th day of June, 1896, to carry into effect an original purpose for which the partnership then existing between Day and Bristol was formed?

"A. Yes."

The jury returned a general verdict in favor of the plaintiffs of \$202.59, which it appears was the price agreed by Day to be paid for the horse, with interest at 6 per cent.

The circuit court explained to the jury the distinction between a trading and a nontrading firm, and directed them that, if this was found to be a trading firm, or held out as such, the plaintiffs should recover on the note. The court then said further:

"I charge you that each member of a nontrading partnership has the legal right to purchase articles which are necessary in the business, and by the said purchase to bind himself and the other member of the firm for the payment thereof. * * * It makes no difference in this case how many horses Mr. Bristol individually owned, or how many horses Mr. Day individually owned. If you find that the horse in question was reasonably necessary in carrying on the business of the firm, then Mr. Day had the legal right to purchase it, and fix the price therefor, and to bind defendant Bristol thereby. * * * If you find that the horse in question was reasonably necessary in carrying on the business of the firm, and that Mr. Day agreed to pay Mr. Cook \$175 therefor, your verdict should be for the plaintiffs for that amount, and interest at 6 per cent. from June 24, 1896."

The verdict and judgment were entered against Bristol alone.

1. It is contended by counsel for defendant Bristol that it was error to enter judgment against Bristol alone. There can be no doubt but that judgment should have been entered against both defendants. It could not stand

against Bristol alone. If he be liable at all, it is as a partner of Day. This question does not seem, however, to have been raised in the court below. The judgment on the first trial was against both. Defendant Bristol severed for the purpose of bringing the case to this court. The case has been again tried. No discontinuance has been entered against Day. It is conceded by counsel for defendant Bristol that the proceedings on the present trial were in fact against both defendants, and the judgment should have been so entered. The judgment should be amended in the trial court, and will be treated here as having been entered against both.

2. The special findings of the jury are not so inconsistent as to justify a reversal of the case. Defendant Bristol admits that he was in partnership with Day. There is no doubt whatever as to certain business of that partnership. It was raising and selling fruit from a 40-acre farm. Day was intrusted with the management of the business. It is evident that the business could not be carried on without the use of horses. There was evidence tending to show that the horse was necessary to the proper conduct of the business. This question was properly left to the jury. The fact that no express authority was given by Bristol to Day to purchase the horse was not fatal to the action.

3. Defendant Bristol gave notice, with his plea, that the horse was represented by Cook to be sound, and worth \$175; that Cook knew this was untrue; that the horse was not sound; and that he would recoup damages against any claim proved by the plaintiffs. At the conclusion of the testimony, defendant's counsel requested the court to instruct the jury that, if they should find that the horse was not worth \$175, and that Cook knew that fact at the time of the sale, that would be evidence they might consider tending to establish Cook's bad faith, and tending to prove conspiracy between him and Day to defraud defendant Bristol. Defendant introduced evidence tending to show that the horse was not worth to exceed \$50.

Under this notice of recoupment he might have been reimbursed the difference between the actual value and the purchase price, provided he had been able to establish fraud and conspiracy on the part of Day and Cook. Under the findings of the jury, the horse was properly bought, and became the property of the partnership. The law would not permit the defendant to retain the horse, and escape all liability by showing fraud and conspiracy in the sale. Defendant preferred no request for the recoupment of damages. The case evidently was not tried upon that theory, but upon the theory that there was no liability whatever. Under this state of facts, the request was properly refused.

The judgment must be affirmed.

The other Justices concurred.

BRITTON v. MICHIGAN CENTRAL RAILROAD CO.

1. RAILROAD CROSSINGS—CARE IN APPROACHING—PLEADING AND PROOF—VARIANCE.

Where plaintiff, who had alleged in his declaration that, as he approached a railroad crossing, he slowed his horse down to a very slow walk, and looked and listened for trains, and that he continued so to do until he was struck by a train, which he had been unable to see because of obstructions,—was given leave to amend his declaration so as to cover testimony that he stopped his horse, leaned forward, and looked out at the side of his closed carriage, and refused so to amend, the admission of the testimony was reversible error.

2. SAME—SIGNALS—CONFLICTING EVIDENCE—WHAT CONSTITUTES.

The testimony of the occupants of a closed carriage, struck by a train at a railroad crossing, that, although they stopped two rods from the track, and listened, they heard no crossing signals, does not rise to the dignity of evidence, so as to take the question to the jury, where all the members of the train

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crew, and a bystander, an entirely disinterested witness, testify positively that the signals were given, and state the reasons for their recollection.

8. SAME—LOOKING AND LISTENING—CONTRIBUTORY NEGLIGENCE.

The duty of one about to cross a railroad track, to look and listen for approaching trains, is not discharged by stopping his horse 30 feet from the track, and looking and listening, but he should look and listen for the entire distance; and where one, after so stopping, rode the 30 feet in a closed carriage, paying no heed to the light cast upon the track by the headlight of an engine, for the reason that he thought it the reflection of an electric lamp located 400 feet away, he was guilty of contributory negligence, precluding a recovery for injuries caused by the train's striking him at the crossing.

Error to Shiawassee; Smith, J. Submitted October 6, 1899. Decided December 21, 1899.

Case by Martinus S. Britton against the Michigan Central Railroad Company for personal injuries caused by a collision with defendant's train at a highway crossing. From a judgment for plaintiff, defendant brings error. Reversed.

R. A. Montgomery, for appellant.

Watson & Chapman, for appellee.

LONG, J. 1. It is a common and just rule of pleading that the plaintiff must stand upon the averments in his declaration. He cannot allege one case of negligence, and prove another. He cannot be permitted to show a state of facts entirely different from that charged in the declaration. Plaintiff averred that, as he approached the crossing,—

“He looked and listened for an approaching train, slowed his horse down to a very slow walk, and continued to look and listen for an approaching train as he neared the point where said railway crossed Chipman street, at which time it was so dark that said plaintiff could not see; that his view was obstructed by the line of freight cars above mentioned; * * * and he began so listening when he was within about 20 rods of said crossing, and

continued to so listen until he was struck by said train on said crossing, and he did not hear any train approaching said crossing; but, just as the horse and part of the buggy in which he was riding got upon said crossing, they were struck by said train."

Upon the trial plaintiff testified that he and his companion stopped the horse, leaned forward, and looked out at the side of their inclosed carriage. This was objected to upon the ground that it was directly contrary to the facts set up in the declaration. The court evidently was at first inclined to so hold, and gave plaintiff permission to amend his declaration. This was refused, and the court admitted the testimony. I think this was error for which the judgment should be reversed.

2. I think the plaintiff did not make out a case of negligence on the part of the defendant. The engineer, fireman, conductor, brakeman, and baggageman all swear positively that the crossing signals were given, and state the reasons for their recollection. In addition to this, an entirely disinterested witness, a merchant, testified that he stood in front of his store, about 200 feet south of the crossing, saw the horse and buggy come along, heard the train come, heard the whistle blow, and watched the parties until they were struck at the crossing. The only testimony opposed to this is that of the plaintiff and his companion, who were riding in this inclosed carriage, who stopped about two rods from the side track—not the main track—for about a quarter to a half minute. They were not at all certain how far they were from the track. A strenuous effort was made on the part of the plaintiff's attorneys to locate them as near the track as possible when they stopped. They immediately started up, and went from there to the track in this inclosed carriage. I do not think this testimony rises to the dignity of evidence, in the face of six witnesses in a position to know, who swear positively that the signals were given.

3. I think the plaintiff was guilty of contributory negligence. He knew he was approaching a dangerous place, where the train was at any time liable to cross. He rode

at least 30 feet, and probably more, without taking any steps to ascertain if a train was approaching. In a second he could have thrown back the top of his carriage, which would have given him and his companion a clear and unobstructed view. He saw a light shining upon the track, and thought it was the light of an electric lamp located about 400 feet away. It was, in fact, from the headlight of the engine. It is also worthy of note that eight witnesses, some of whom had no connection whatever with the railroad, and therefore had no interest, and were unimpeached, testified that the plaintiff said, shortly after the accident, that he saw the train and heard the signals, but thought he had time to get across. Plaintiff admits that, if he had stopped again within a rod of the track, he would undoubtedly have seen the reflection of the light and heard the train. Considering the situation, the darkness of the night, the liability of trains to approach at any moment, it was his duty to keep on the alert from the time he knew he was approaching the track, which he testifies they did when within about four rods, until they reached the track. Does the law justify a party in riding a distance of 30 feet or more from a railroad track without availing himself of the means at his disposal to look and listen? Has he performed his duty by once stopping and looking and listening? According to plaintiff's own testimony, while he was riding these two rods the train would go sixteen rods. Clearly, his duty was to look and listen for the entire distance, and he might have done so, without any inconvenience to himself, by simply pulling the braces of the top of his buggy, and letting it back. *Phillips v. Railway Co.*, 111 Mich. 274 (66 Am. St. Rep. 392). In my judgment, he was guilty of contributory negligence.

The judgment must be reversed, and a new trial ordered.

GRANT, C. J., and HOOKER, J., concurred with LONG, J. MOORE, J., concurred in the result. MONTGOMERY, J., did not sit.

REID, MURDOCH & CO. v. PARKS.

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1. REPLEVIN—JUDGMENT.

8 Comp. Laws 1897, § 10660, providing that in replevin, if the goods and chattels specified in the writ shall not be found, or shall not be delivered to the plaintiff, he may proceed in the action for the recovery of the same, or the value thereof, does not authorize a recovery for goods not in defendant's possession when the writ was sued out.

2. SAME—POSSESSION—PRESUMPTION.

Goods not in the possession of defendant in replevin on the day the writ issued were presumably not in his possession when the writ was sued out.

3. SAME—PARTIAL RECOVERY—BAR—ASSUMPSIT.

A judgment in replevin for such portion of the goods described in the writ as were in defendant's possession when the writ was sued out is not a bar to an action of *assumpsit* for the value of the remainder.

4. SAME—COSTS.

Nor should the fact of the former suit deprive plaintiff of his right to costs in the latter.

Error to Berrien; Coolidge, J. Submitted October 24, 1899. Decided December 21, 1899.

Assumpsit by Reid, Murdoch & Company against Jerome Parks for goods sold and delivered. From a judgment for plaintiff on verdict directed by the court, defendant brings error. Affirmed.

O'Hara & O'Hara, for appellant.

Charles W. Stratton and *Lawrence C. Fyfe*, for appellee.

MONTGOMERY, J. The plaintiff, from July 9, 1897, to August 19, 1897, inclusive, sold to the defendant various bills of groceries, amounting in the aggregate to \$303.43

in value. On September 3, 1897, the plaintiff commenced an action of replevin to recover these goods on the claim that they were obtained fraudulently, and with intent not to pay for them. The writ and declaration covered all the goods sold between these dates, but the record shows that only a portion of the goods, amounting to \$86.85, were recovered. The replevin case proceeded to judgment, which was in favor of the plaintiff for six cents damages and costs. There was no recovery for the value of the goods not replevied. The present action is brought to recover the value of the goods not recovered in the action of replevin, the plaintiff waiving the tort, and suing in *assumpsit*. The defendant brings error, urging two grounds: *First*, that the replevin suit is a bar to this action; *second*, that, in any event, the plaintiff should not recover costs in this action.

If the plaintiff might have recovered for these goods in the former action, that action should be held a bar to the present. *Bond v. Markstrum*, 102 Mich. 11. Whether the plaintiff could have recovered for the goods in that action depends upon the construction to be given sections 10648, 10660, 3 Comp. Laws 1897. The first of these sections provides that replevin may be brought for the recovery of goods or chattels unlawfully taken or unlawfully detained. The latter section provides that, if the goods and chattels specified in any writ of replevin shall not be found, or shall not be delivered to the plaintiff, he may proceed in the action for the recovery of the same, or the value thereof. Section 10676 prescribes the form of judgment in such cases. It has been repeatedly held that these provisions do not authorize a recovery for goods not in the possession of defendant when the action of replevin is brought. Section 10654 requires an affidavit to be attached to the writ, stating, among other things, that "such goods and chattels are unlawfully detained by the defendant in such writ." In *Hinchman v. Doak*, 48 Mich. 168, the court said:

"When the defendant established the fact that he was

not in possession when suit was instituted, he showed that he was entitled to have the case dismissed out of court, and to recover his costs."

See, also, *Reid, Murdoch & Co. v. Ferris*, 112 Mich. 693.

The evidence on this trial shows that the goods not recovered in the action of replevin were not in defendant's possession on the day the writ issued. This testimony was not disputed, and the only reasonable inference is that the goods were not in his possession when the writ was sued out. They could not, therefore, have been recovered in that action. This being so, there would be no more propriety in treating such action as a bar than in so regarding a premature action. See *Wells*, Res Adj. § 454. The question involved in this case has been, in effect, decided by this court. *Farwell v. Myers*, 59 Mich. 183, 64 Mich. 234; *Reid, Murdoch & Co. v. Ferris*, 112 Mich. 693.

The same considerations dispose of the question of costs raised by defendant.

Judgment is affirmed.

The other Justices concurred.

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BLADES v. BOARD OF WATER COMMISSIONERS OF DETROIT.

1. MUNICIPAL CORPORATIONS—WATERWORKS—SYSTEM OF SUPPORT—CHANGE BY STATUTE—INSUFFICIENT TITLE.

Act No. 408, Local Acts 1899, entitled "An act to transfer to the city of Detroit the title to all the property, of every name and nature, now owned, operated, and controlled by the board of water commissioners of the city of Detroit under [an act of 1853 and amendments], and to give to said city of Detroit the possession, control, and operation and management of said property," and embracing provisions for the supplanting of the existing system of waterworks, supported by a levy of water-rates upon all consumers, by a system involving free water to the municipality and for domestic consumption, to be provided for by a general tax levy, is in contravention of article 4, § 20, of the Constitution, providing that no law shall embrace more than one object, which shall be expressed in its title.

2. SAME—COMPULSORY TAXATION FOR LOCAL PURPOSES—ILLEGALITY.

The provisions of section 9 of Act No. 408, Local Acts 1899, which constitute the mayor and certain other officers of the city of Detroit a board for the purpose of estimating annually, and reporting to the common council, the amount of money which they deem a just proportion of the total amount required for the support of the waterworks, as previously determined by the council and board of estimates, for the expense of furnishing water for domestic and other specified uses, and which provide for the levy and assessment of the proportionate amount so reported upon the taxable property of the city, without submission to the board of estimates or to a vote of the freemen, are unconstitutional and void, as imposing taxation for a purely local purpose without the consent of the electors or their chosen representatives.

3. SAME—WATER BENEFITS—FRONTAGE.

The provision of section 6 which contemplates an assessment against the individual lot-owner of his proportionate share of the cost of laying water-pipe in the block in which his lot is situated, such proportion to be ascertained "by finding the ratio which the narrowest frontage of said lot bears

to the entire frontage on both sides of the street or alley in the block," is also illegal.

4. SAME—CONSTRUCTION OF STATUTES.

The unconstitutional scheme of taxation provided for in sections 6 and 9 of Act No. 408, Local Acts 1899, is so interwoven with the entire frame of the act, that the whole act must fall.

Certiorari to Wayne; Carpenter, Lillibridge, Hosmer, and Waite, JJ. Submitted October 24, 1899. Decided December 21, 1899.

Mandamus by Francis A. Blades, comptroller of the city of Detroit, to compel the board of water commissioners of said city to turn over to him the books, papers, and property of the waterworks system, in accordance with the provisions of Act No. 408, Local Acts 1899. From an order denying the writ, relator brings *certiorari*. Affirmed.

In 1853 the legislature passed an act (Act No. 90, Laws 1853) entitled "An act to amend the laws relative to supplying the city of Detroit with pure and wholesome water," which act was approved February 14, 1853. Under this act the present board of water commissioners of the city of Detroit was organized, and it has ever since conducted its affairs under that act and acts amendatory thereof. The material provisions of that act are as follows:

"SECTION 1. *The People of the State of Michigan enact*, That Shubael Conant, Henry Ledyard, Edmund A. Brush, William R. Noyes, and James A. Van Dyke be and they are hereby named and constituted as a 'board of water commissioners of the city of Detroit,' who, and their successors in office, shall be known by the name and style of the 'Board of Water Commissioners of the City of Detroit,' and by that name shall have power to contract, sue, and be sued, to purchase, hold, and convey personal and real estate, to have a common seal, to alter and change the same at pleasure, to make by-laws and ordinances, and do all legal acts which may be necessary and proper to carry out the effect, intent, and object of this act.

"SEC. 2. The said commissioners shall hold their offices

respectively for the term of three, four, five, six, and seven years from the first Tuesday in May of the year one thousand eight hundred and fifty-three. Said commissioners shall, within sixty days after the passage of this act, decide by lot their respective terms, which decision shall be notified by a written statement to the common council of said city, which shall be entered of record on the books of the said common council; and at their first regular meeting in the month of April in the year one thousand eight hundred and fifty-six, and annually thereafter, the said common council shall elect and appoint a citizen of said city, being a qualified voter and a freeholder, as a commissioner, who shall hold his office for five years from the first Tuesday in the May next following: *Provided*, that this section shall not be so construed as to disqualify any member of the said board for re-appointment; and in case of the death, or resignation, or removal from the city of any of said commissioners, the common council shall, as soon thereafter as possible, appoint to fill such vacancy, for the remainder of the term, some citizen of said city, being a qualified voter and freeholder."

"SEC. 4. The said commissioners shall have power to loan from time to time, upon the best terms they can make, after giving public notice by advertising in the city papers for sixty days, and in one paper in Boston, and two in New York, for such time as they shall deem expedient, a sum of money, not exceeding two hundred and fifty thousand dollars, upon the credit of said city of Detroit, and shall have authority to issue bonds pledging the faith and credit of said city for the payment of the principal and interest of said bonds; which bonds shall issue under the seal of said board of commissioners, and shall be signed by them, or a majority of them, and bearing interest not exceeding eight per cent. per annum. And it shall be the duty of said commissioners to cause to be kept an accurate register of all the bonds issued by them, showing the number, date, and amount of each bond, and to whom the same was issued; and it shall also be their duty to cause to be furnished to the auditor of said city a copy of such register as soon as the same is made, which shall be preserved by said auditor, and copied into the records of said city.

"SEC. 5. It shall be the duty of said commissioners to examine and consider all matters relative to supplying the

city of Detroit with a sufficient quantity of pure and wholesome water, to be taken from the Detroit river, or such other source as may be deemed expedient, for the use of its inhabitants.

"SEC. 6. Said commissioners shall have power to employ superintendents, clerks, collectors, assessors, engineers, surveyors, and such other persons as, in their opinion, may be necessary to enable them to perform their duties under this act, and to specify the duties of such persons so employed, and to fix their compensation: *Provided*, that in no case shall said commissioners receive, directly or indirectly, any compensation for their own services.

"SEC. 7. Said commissioners shall have power, and it is hereby made their duty, as soon as may be after the necessary funds have been procured as herein provided, to purchase such land and materials, and to construct such reservoirs, buildings, machinery, and fixtures, as shall be deemed necessary or desirable to furnish a full supply of water for public and private use in said city.

"SEC. 8. Said commissioners shall have power to construct reservoirs, jets, and fire hydrants at such localities in said city as they may deem expedient and necessary, and to lay pipes in and through all the alleys and streets of said city; and also to construct in such localities as they may deem expedient, not exceeding one to each block, hydrants for public use, and to keep the same in repair; and also, with the consent of the common council of said city, to construct fountains in the public squares, or such other public grounds of said city as they shall deem expedient.

"SEC. 9. Said commissioners shall, from time to time, cause to be assessed the water-rate to be paid by the owner or occupant of each house or other building having or using water, upon such basis as they shall deem equitable; and such water-rate shall become a continuing lien, until paid, upon such house or other building, and upon the lot or lots upon which such house or other building is situated."

"SEC. 13. Whenever the receipts of said board, from water-rates or other sources, shall accumulate so that there shall be a surplus, amounting to a sum of not less than five hundred dollars, not needed for the payment of the current expenses or the extension of said works, it shall be the duty of the commissioners, together with the auditor of said city, who shall be associated with them for that

purpose, to invest the same in some safe stocks, or upon other real or personal securities. Such investment shall be made in the name of said board, and in such manner as to make the same available for the payment of interest and principal of the bonds issued as aforesaid as soon as may be. It shall be the duty of said commissioners to pay the interest on such bonds, and, as fast as such surplus fund will permit, also the principal, as the bonds become due, as funds for such purpose shall from time to time accumulate. The said commissioners may, when they have funds for that purpose, purchase the bonds so issued as aforesaid, whether the same have become due or not; and in case the said commissioners shall at any time not have funds on hand sufficient to meet any of the said bonds at the time when they shall become due, they shall have the right to issue new bonds, for such amount and on such time as they shall deem expedient, in the place of bonds so becoming due as aforesaid; the said old bonds to be canceled in the registry thereof, and the said new bonds to be recorded in the manner hereinbefore provided."

"SEC. 24. It shall be the duty of said commissioners, at least thirty days before the time fixed by the ordinance of said city for assessing city taxes, to make a special report to the common council of said city, what, if any, sum will be needed by said commissioners, over and above the revenue of said board, to meet the payment of interest or principal of the bonds issued as aforesaid; and it shall be the duty of the common council to raise said amount by special tax in the same manner as general taxes, to be designated a water tax; and the said amount shall be paid over to said board by the treasurer of said city."

"SEC. 26. All lands, lots, docks, buildings, machinery, pipes, logs, hydrants, and all fixtures whatsoever, purchased, designated, or used for the present waterworks of the said city of Detroit, are hereby conveyed to and vested in said board of commissioners, who shall have full power to regulate, protect, and control the same; and all the authority, rights, and power heretofore exercised and had by said city over said works are hereby continued to and vested in said board of commissioners."

By subsequent acts of the legislature, the respondent was authorized to issue bonds for the purpose of extending and improving the waterworks. In 1873 a loan of a million dollars was authorized. Section 2 of that act (Act No. 302, 3 Laws 1873) is as follows:

"If the said commissioners shall, at any time, not have funds on hand sufficient to meet any of the said bonds at the time when they shall become due, they shall have the right to issue new bonds, for such amount and on such time as they shall deem expedient, in the place of the bonds so becoming due as aforesaid, or such part thereof as said commissioners shall be unable then to pay. The said old bonds so taken up shall be canceled, and such cancellation recorded or otherwise indicated in the registry thereof, and the said new bonds shall be recorded in the manner hereinbefore provided. It shall be the duty of the common council, and said council is hereby empowered, to cause to be levied and assessed annually, upon the taxable property in said city, the sum of seventy-five thousand dollars, the same to be included in each annual tax assessment levied on said city, and the same shall not require or be conditioned upon the vote of the freemen of said city. The said sum shall be collected the same as other general taxes, and shall, from time to time, as received, be paid over to said board by the treasurer of said city; and the moneys so paid over by said treasurer to said board shall be used and appropriated by said board, *first*, in payment of the interest of said bonds; *second*, if there be any surplus after payment of the interest accruing during the year, said moneys shall be paid into and form a part of the sinking fund of said board, and used and appropriated to the payment of said bonds when due, or to the purchase of the same, or of any other of the bonds heretofore issued by said board, as the said board may, from time to time, think expedient."

The purpose of this loan was the removal of the water-works outside the territorial limits of the city of Detroit. In 1887 an act (Act No. 539, Local Acts 1887) was passed which, among other things, authorized the respondent to accept a bequest made to it by Chauncey Hurlbut, who had been for many years the president of the board.

The value of the property under the control of the commissioners January 1, 1899, was \$6,030,963.29. Up to 1875 it had been supported by water-rates alone. From that year to the present a general per annum tax has been levied, under the direction of the common council, under the section last above quoted, amounting to from about \$18,000 to about \$74,000.

In 1899 the legislature passed an act (Act No. 408, Local Acts 1899) entitled :

“An act to transfer to the city of Detroit the title to all the property, of every name and nature, now owned, operated, and controlled by the board of water commissioners of the city of Detroit, under the powers, rights, and privileges granted said board of water commissioners by an act entitled ‘An act to amend the laws relative to supplying the city of Detroit with pure and wholesome water,’ approved February fourteenth, eighteen hundred fifty-three, and the acts amendatory thereto, and to give to said city of Detroit the possession, control, and operation and management of said property, and to repeal all acts and parts of acts in conflict herewith.”

Section 1 provides for the transfer of all the property, authority, rights, and powers of the board of water commissioners to the city of Detroit, and provides that the operation, extension, and improvement of the system shall be under the direction and supervision of the board of public works.

Section 2 provides for the laying of pipes, mains, etc., in the streets and through private property; defining the proceedings to be instituted for condemnation.

Section 3 provides for the purchase of lands, and the erection of buildings and machinery.

Section 4 provides for the assumption by the city of Detroit of the bonded and other indebtedness of the board of water commissioners, and also of all lawful contracts entered into by said board of commissioners, and for the prosecution of all suits then pending.

Section 5 provides for the erection of drinking hydrants for public use.

Section 6 provides for the erection of a separate department of the board of public works, to be known as the “Water Department” thereof, and for the employment of superintendent, clerks, etc.; for the removal of the superintendent; for the classification of the work of the department, and the keeping of accounts. It also contains the following provisions :

"It shall keep a separate account of the cost of laying distributing pipes, aqueducts, and mains hereafter laid, so that the cost thereof in each block may be ascertained at any time, and so that, whenever a pipe or main larger than six inches in diameter is laid, the cost of laying the six-inch pipe in each block, had it been laid, may also be ascertained. The just proportion of the cost of laying said six-inch pipes shall be assessed to each lot benefited. Such just proportion shall be ascertained by finding the ratio which the narrowest frontage of said lot bears to the entire frontage on both sides of the street or alley in the block where said lot is located. The amount of such just proportion due from each lot, when ascertained, shall be assessed as a special assessment upon such lot. The common council shall provide by ordinance for the collection of all such special assessments. Lots already supplied with water shall not be subject to special assessment for water-pipes hereafter laid. No lot shall be supplied with water from any pipe, main, or aqueduct hereafter laid, without there is first paid to the city treasurer the just proportion of the cost of laying a six-inch pipe in the street or alley on which said lot abuts, with interest thereon from the time said pipe is laid. Such money, when paid, shall be credited to the water department construction fund."

Section 7 provides for the distribution of water outside the city.

Section 8 provides for a division of the revenues and moneys of the water department of the board of public works into separate funds.

Sections 9 and 10 are as follows:

"SEC. 9. It shall be the duty of the board of public works to transmit to the common council of the city of Detroit, on or before the fifteenth day of February in each year, an estimate of the amount of moneys which said board may deem necessary for improving and enlarging the pumping works and plant of the waterworks of the city of Detroit; also an estimate of the amount of money said board may deem necessary to pay the cost of extending water mains and pipes, and for any other purpose essential to the proper maintenance and operation of the waterworks and water system of said city. Such estimates, or so much thereof as the common council shall approve, shall be submitted to the approval of the board

of estimates, at the meeting thereof required by law for the approval of annual taxes voted by said common council; and so much of said estimates as shall be approved by the board of estimates shall be placed upon the general assessment rolls, and shall be assessed, levied, and collected the same as other city taxes. Said money, when collected, shall be paid into the city treasury, and shall be credited to the construction fund of the water department. They shall also transmit to the common council, on or before the fifteenth day of February of each year, an estimate of the total amount of money they deem necessary to pay the cost of maintaining and operating the water plant for the ensuing fiscal year, which shall include all necessary repairs. Such estimate, or so much thereof as the common council and board of estimates shall approve, shall be levied and collected as hereafter provided.

“The board for fixing water-rates, as provided for in section ten of this act, shall prepare and transmit to the common council, on or before the first day of May in each year, an estimate of the amount of money they deem a just proportion of the total estimate for maintenance as a reasonable charge for the expense of furnishing water for domestic purposes to the inhabitants of the city of Detroit, such domestic purposes to include such use of water in and about places of residence as are usual for household purposes; and for water used for water-closets and wash-room facilities in all buildings used wholly or in part for other than residence or household purposes; to the city of Detroit, including its agencies and municipal boards, the Detroit house of correction, the public schools, and such charities as the common council shall have determined to exempt from the payment of water-rates,—which estimate shall be in detail, specifying the objects of such expenditure, the sums desired for each, and the reasons therefor. It shall be the duty of the common council to cause to be levied and assessed, upon the taxable property of the city, the sum so stipulated, as contemplated in the preceding paragraph, and the same shall not be submitted to the board of estimates or to a vote of the freemen of the city. When such tax is collected, it shall be paid into the city treasury, and credited to the water department maintenance fund. The balance of the total estimate for operating expense shall be assessed as water-rate, to be paid by the owner or occupant of each house or other building having or using water, and against any persons using

water, except for domestic purposes, in the city of Detroit, upon such basis as they shall deem equitable; and such water-rate shall become a continuing lien, until paid, upon such house or other building, and upon the lot or lots upon which the house or other building is situated; and all such water-rates, when collected, shall be paid into the city treasury, and credited to the water department maintenance fund.

"Any surplus of moneys remaining in the maintenance fund at the end of any fiscal year shall be applied to and credited to the maintenance fund of the ensuing fiscal year, and shall be used for no other purpose. Any surplus of money remaining in the construction fund at the end of any fiscal year shall be applied to and credited to the construction fund of the ensuing fiscal year, and shall be used for no other purpose. On and after the first day of July, eighteen hundred ninety-nine, the water-rates, as heretofore levied and collected by the water commissioners, shall continue to be levied and collected under the supervision of the board of public works, until the first day of July, nineteen hundred, when said rates shall cease, and thereafter the water-rates shall be assessed and collected as provided for in this act.

"SEC. 10. The superintendent of the water department, the mayor, the president of the board of public works, the city comptroller, and the city treasurer shall constitute a board for fixing water-rates, which shall, on or before the first day of May of each year, fix a schedule of the water-rates to be collected for the ensuing fiscal year, which schedule shall comply with the requirements of the preceding section. The water-rates so fixed shall be collected by the receiver of taxes in such manner and at such times as shall be provided by an ordinance by the common council."

Section 11 provides for an annual report by the city comptroller of the financial condition of the water department, and provides for access to the books for that purpose.

Section 12 provides for a distribution of the revenue received from the house of correction, and that all the bonds mentioned and provided for in this act shall continue to be exempt from the charter provision limiting the bonded indebtedness of the city.

Section 13 provides a penalty for injuring any of the property of the waterworks.

The act contains no repealing clause.

The respondent refused to turn over to the relator the books, property, etc., under its control. Thereupon he applied to the circuit court for the county of Wayne for a writ of *mandamus* to compel such delivery. The case was there heard before four of the circuit judges, three of whom (Judges Carpenter, Lillibridge, and Hosmer) held the law to be void. The majority opinion held that the scheme of taxation provided in section 9 of the act is unconstitutional, because, in a matter purely local, the power of taxation was conferred upon a board appointed by the legislature, in which the taxpayers and freemen of the city were allowed no voice, either by direct vote or by those chosen to represent them for that purpose, and that this unconstitutional scheme was so interwoven with the entire frame of the act that the entire act must fall. In a concurring opinion filed by Judge Hosmer, he held that the object of the law was not expressed in its title, and that the act was, for this reason, void. Judge Waite dissented, and, while he held that certain provisions were unconstitutional, he also held that the waterworks might be carried on and maintained as heretofore, and that the balance of the act could stand, without the unconstitutional provisions.

Charles Flowers and *Charles D. Joslyn* (*John J. Speed*, of counsel), for relator.

Fred A. Baker (*Henry M. Duffield*, of counsel), for respondent.

GRANT, C. J. (*after stating the facts*). The validity of the act of 1899 presents the sole question involved in this proceeding. Its validity is attacked upon numerous grounds. The only ones necessary to discuss and determine are involved in the following questions: (1) Is the object of the act expressed in its title, within section 20, art. 4, of the Constitution, that "no law shall embrace more than one object, which shall

be expressed in its title?" (2) Is the scheme of taxation provided by the act valid? (3) If not valid, can the act stand with this provision stricken out?

1. The present board of water commissioners holds, and has possession of, this property as a trustee for the city. The city is the owner, just as effectually as though the deeds were made direct to it. Under the new act, the property is no more and no less the property of the city than it was under the old act. The legislature so understood; for section 1 declares the title to be conveyed to, and vested in, the city by virtue of the act. No deeds of conveyance or evidences of transfer from the board of water commissioners are required. The operation, extension, and improvement of the system, as provided in the act, are intrusted to the direction and supervision of the board of public works of said city, which is directed to have a separate department, to be known as the "Water Department of the Board of Public Works," with power to employ superintendent, clerks, etc., and to specify their duties, their compensation to be fixed by the common council. The administrative control and management is transferred from the water board to the board of public works, the principal difference between the authority of the former board and the latter being that the latter is more under the control of the common council than the former; in other words, the board of water commissioners can do certain acts without the consent of the common council, whereas the board of public works cannot do them without such consent. We are not prepared to hold that, looking into the body of the act, its sole object is to transfer the control and management of the waterworks to the board of public works. It is unnecessary to decide this question.

It is pertinent here to determine what the object of the act is, as expressed in the title. It was not to transfer the title to the property to the city, for that the city already had. It was evidently to transfer and give to the city the "possession, control, and operation and management,"

which had theretofore been exercised by the board of water commissioners. Does the title purport to contemplate a complete revision of the system by which the waterworks had been supported for nearly half a century, and the transfer of its management under rules and regulations radically different from those which had theretofore existed? If this were an original act to authorize the city to establish a water department, and to provide for the control, operation, and management thereof, such title would undoubtedly be sufficient, as is clearly shown in *People v. Mahaney*, 13 Mich. 495, and *People v. Hurlbut*, 24 Mich. 44 (9 Am. Rep. 103). We have given the two acts almost in full, so that the difference may be readily seen. The purpose of this constitutional provision is that legislators, and as well parties interested, may understand from the title that only provisions germane to the object therein expressed will be enacted. Would the title to this bill, as introduced in the legislature, when read by a taxpayer of Detroit, be notice to him that the system of supporting the waterworks was to be changed from that of water-rates to that of taxation? Would it be notice to the manufacturers and the business men of Detroit that they were to pay water-rates, while all the rest—a great majority—of the city were exempt, and were to have free water, and that they were to be taxed to furnish free water to their neighbors? Clearly, no such object can be found in the title, which simply authorizes the transfer from one department of the city government to another, and gives to the transferee the possession, control, operation, and management thereof. Obviously, it would not naturally be inferred that the legislature, under such a title, intended to make the radical changes provided for in the body of this act. What is there to indicate an intention to virtually abolish the water-rate system, and substitute taxation in its stead? or to provide free water to the inhabitants of the city? or to give water to private individuals, and charge its cost to the taxpayers? As is well stated by Judge Hosmer in his

opinion, there is "no natural connection between the title of the act and the extraordinary provisions for raising the means necessary to defray the incidental expenses." What we said in *Grosvenor v. Duffy*, 121 Mich. 220, is equally applicable here. See, also, *Ryerson v. Utley*, 16 Mich. 269. The fair inference to be drawn from this title is that the object is to take away the possession of the waterworks, and its control and management, from the board of water commissioners, and transfer them to the city, and that the body of the act would contain only such provisions as were essential to accomplish that object.

2. The method provided by this act for the support and maintenance of the waterworks is unconstitutional and void. While the provisions of the act are somewhat incongruous, it is apparent that it imposes compulsory taxation for purely local purposes. The board established by section 10, to fix water-rates, is also, by section 9, directed to prepare and transmit to the common council an estimate of the amount they deem a just proportion of the total estimate for maintenance as a reasonable charge for furnishing water for domestic and other purposes therein specified. It is then made the duty of the common council to levy and assess upon the taxable property of the city the sum so fixed, and that it shall not be submitted to the board of estimates or to a vote of the freemen of the city. The furnishing of water to the city and its inhabitants is a purely local matter, and it is not within the power of the legislature to compel taxation for that purpose, without the action of the freemen of the city or their chosen representatives. This question was fully and ably discussed in *People v. Common Council of Detroit*, 28 Mich. 228 (15 Am. Rep. 202), which is the leading case in this State upon the subject. In an exhaustive opinion by Justice COOLEY, where the attempt was made by the legislature to impose compulsory taxation for the maintenance of a park, he closes his discussion with the following pertinent language:

"No precedent entitled to respect can justify such a change of powers; for, from the very dawn of our liberties, the principle most unquestionable of all has been this: That the people shall vote the taxes they are to pay, or be permitted to choose representatives for the purpose."

In a concurring opinion, Justice CAMPBELL said:

"From time immemorial, every municipal government, properly so-called, and acting within its peculiar sphere, has acted through its common council, composed either of the burgesses or their representatives, subject in some cases to checks and vetoes, but not subject to legislation or final action in defiance of their own decisions. Their supremacy cannot be given up by themselves any more than it can be taken from them. No doubt the State can limit their powers, but it cannot transfer them."

The question is there so thoroughly discussed that we deem it unnecessary to further consider the question. See, also, *Commissioners of Parks & Boulevards of Detroit v. Common Council of Detroit*, 80 Mich. 663.

The judges below all agree that the provision contained in section 6 for assessing the cost of laying a six-inch pipe in front of each lot is void, and in this opinion we concur.

3. The body of this act provides a complete revision and change in the system of maintaining and conducting the waterworks. The leading feature in it is the change from maintaining it by water-rates to that of taxation and free water. Nearly all its provisions are in conflict with the act of 1853. The leading feature in the body of the act is not the transfer from one department to another, but the complete change in the system. It cannot be said that the legislature intended simply to transfer the property, control, and management, and not to impose upon the new body the provisions incorporated for such management and the method for raising the necessary funds to sustain and carry it on. This would require the courts to say that the legislature intended to retain the old system if the new one could not prevail. This would amount to judicial legislation, and compel us to legislate into the act

that which it does not contain. With these provisions eliminated, resort must be had to the old system of water-rates, which it was the clear intention of this act to substantially eliminate. The unconstitutionality of these provisions renders the whole act void. See *Quinlon v. Rogers*, 12 Mich. 168; *Campau v. City of Detroit*, 14 Mich. 276; *Warren v. Mayor, etc., of Charlestown*, 2 Gray, 99; *Jones v. Robbins*, 8 Gray, 339; *Slauson v. City of Racine*, 13 Wis. 398.

The judgment is affirmed.

The other Justices concurred.

PRESTON NATIONAL BANK v. LEONARD.¹

**FRAUDULENT CONVEYANCES—HUSBAND'S USE OF WIFE'S MONEY—
EVIDENCE OF LOAN.**

Where semi-annual dividends upon stock belonging to a married woman, but purchased in part with her husband's money, were, for a period of 12 years, turned over to the husband and used by him, without any understanding that they constituted a loan from the wife that he was expected to repay, a conveyance of property to the wife in repayment of the dividends, made after the circumstances of the parties have become reduced from affluence to insolvency, will not be upheld as against an execution creditor of the husband.

Appeal from Wayne; Frazer, J. Submitted October 25, 1899. Decided December 21, 1899.

Bill by the Preston National Bank of Detroit against Henry R. Leonard, Annie E. Leonard, and Albert L. Stephens in aid of execution. From a decree declaring a lien in favor of defendant Annie E. Leonard, complainant appeals. Reversed.

¹ Rehearing denied April 3, 1900.

122	381
s126	379
122	381
s81W	920

De Forest Paine, for complainant.

George W. Radford, for defendants Leonard.

MONTGOMERY, J. This case relates to a portion of the property dealt with in *Stephens v. Leonard*, *ante*, 125. The present bill is filed to subject the equity of the Eliot-street property (less the homestead interest) to a sale to satisfy a judgment obtained by complainant against Henry R. Leonard.

The defendant Henry R. Leonard conveyed this property to his wife, Annie E. Leonard, by quitclaim deed, on the 25th of April, 1898, while suit was pending on complainant's demand, and two days before judgment rendered. Under Act No. 99, Pub. Acts 1897, the burden rests on the defendants to show the *bona fides* of the transfer. *Whelpley v. Stoughton*, 119 Mich. 314. The defendants undertook this burden, and testified that Mrs. Leonard, in 1886, became the owner of \$5,000 of stock of the Detroit & Cleveland Steam-Navigation Company; that from that date until after Mr. Leonard was financially crippled by a fire which burned down the building on the Gratiot-avenue property, referred to in *Stephens v. Leonard*, she received dividends semi-annually on this stock at the rate of 10 per cent. per annum, except for one year, when the rate was 8 per cent.; that she turned the proceeds over to her husband, who used the proceeds, and has never accounted for them to her, except by the conveyance in question. The circuit judge treated the various transactions as loans, and declared a lien in favor of Mrs. Leonard for the several amounts, with interest. This holding was based upon the testimony of Mr. and Mrs. Leonard. The important question is, Was it a loan? The two witnesses, it is true, refer to it in general terms as a loan, but neither attempts to tell what was said at any time between them. Mr. Leonard testified in regard to one of the dividend checks as follows:

"Q. What did she do with it?

"A. I have testified that she handed it over to me.

"Q. Indorsed it over to you?

"A. Loaned it to me; yes, sir.

"Q. She loaned it to you?

"A. Yes, sir.

"Q. She indorsed it over to you?

"A. Whenever they came in. She did the same thing for 12 years.

"Q. What did she say when she indorsed over that dividend check to you?

"A. I have no recollection. * * *

"Q. Did you ever have any agreement with her to pay interest?

"A. On what?

"Q. On dividends.

"A. No, sir; no specific agreement.

"Q. Did she ever ask you to pay interest?

"A. She has; yes, sir; since.

"Q. Since the fire?

"A. Yes, sir."

Mrs. Leonard testified on her direct examination as follows:

"Q. Since the purchase of that stock, who has received the dividends paid by the company?

"A. I have received the checks from Mr. Carter.

"Q. What did you do with them?

"A. I gave them to my husband; loaned them to invest for me, or to take care of them for me, I might better say, perhaps; I didn't need them.

"Q. State whether at any time you had any intention or anything was said whereby you were making him a present of those moneys.

"A. I didn't intend to make him a present of them; no, sir."

On cross-examination the witness testified further as follows:

"Q. You have a recollection that those dividend checks came to you, from time to time, twice a year?

"A. Yes, sir.

"Q. That is all you do remember about it,—that you got the checks and turned them over to Mr. Leonard?

"A. I got the checks, and I gave them to him to invest for me, or take care of them for me, I might better say; I don't mean invest. * * *

"Q. And can you remember what was said to Mr. Leonard by you at any time when you indorsed over one of those checks to him?

"A. No; I have already testified that I could not, before the commissioner, clearly.

"Q. Can you remember what he said to you?

"A. No.

"Q. When, at any time, did you say to Mr. Leonard that he owed you any money for anything?

"A. I don't know but that was the first time after the fire. * * *

"Q. What did Mr. Leonard say to you?

"A. Mr. Leonard agreed with me that first day after the fire. We were pretty downhearted.

"Q. He agreed with you that your money had gone with the fire?

"A. Yes, sir.

"Q. Prior to that time, had you ever received any note or writing from him acknowledging a debt to you?

"A. No, sir.

"Q. Had you ever talked to him at any time about paying you interest?

"A. No, sir; I never should have asked him at that time to pay me interest, I suppose.

"Q. You say you gave these dividend checks to Mr. Leonard to take care of for you?

"A. That was the understanding.

"Q. When was that understanding?

"A. With myself, in my own mind. I didn't suppose my husband would defraud me of them. I never knew that it was necessary to make any agreement with my husband for money that might be coming to me or owing to me. I could have gotten it if I wanted to.

"Q. You always considered, when you wanted money, you could have it, until the time of the fire?

"A. I did.

"Q. All you had to do was to ask for it? As a matter of fact, up to the time of the fire, did you ever suppose that you had a legal claim against your husband that you could enforce at law?

"A. If I thought anything about it, I should have supposed so. I never thought of my husband in that connection. I didn't think I should take any legal action against my husband. It never occurred to me that I would have to.

"Q. You were living prosperously, and never had occasion to think of such things? You never had occasion, when you indorsed over those dividend checks, to think of such things?"

"A. No; if I had, I should have mentioned them, I suppose."

We think it is clear enough from this testimony that the dividend checks were handed over to the husband without any expectation of recovering the amount. The situation of the parties supports this theory. They were living at the time in affluence. Some \$1,500 of Mr. Leonard's money had gone into the purchase of this very stock. What more natural than that the income should be turned into his hands? There was no agreement to repay. The money was handed to him freely, and, we are convinced, without any understanding by either that an indebtedness was being created. That money of the wife, thus appropriated by the husband by her consent, and without any intention of creating an indebtedness, cannot be the basis of an equitable right to sweep away the assets from creditors, is, we think, clear. *Ball v. Phenicie*, 94 Mich. 355; *In re Hauer's Estate*, 140 Pa. St. 420 (23 Am. St. Rep. 245); *Humes v. Scruggs*, 94 U. S. 22; *Case Manfg. Co. v. Perkins*, 106 Mich. 349; *Hanson v. Manley*, 72 Iowa, 48; *Grover & Baker Sewing-Machine Co. v. Radcliff*, 63 Md. 496.

Some criticisms are made of the procedure. The criticisms are lacking in merit.

The decree will be reversed, and a decree entered in this court for complainant, with costs of both courts.

HOOKEE, MOORE, and LONG, JJ., concurred. GRANT, C. J., did not sit.

FLANAGAN *v.* FLANAGAN.

1. DIVORCE—DENIAL OF MARRIAGE—SUBMISSION TO JURY—WAIVER OF RIGHT.

Defendant in divorce proceedings, who denies the marriage, waives the right to have the issue submitted to a jury, under the provisions of 1 Comp. Laws 1897, § 444, where he makes no request for its submission.

2. COMMON-LAW MARRIAGE—EVIDENCE.

Where a marriage ceremony is performed between two persons, who afterwards cohabit for eight years, until the woman discovers that the man, at the time of the ceremony, was undivorced from a former wife, and the parties agree, upon a divorce being obtained, that they will treat the ceremony as binding, and they continue for three years more to live together, they are properly held, in divorce proceedings, to be husband and wife.

Appeal from St. Clair; Vance, J. Submitted October 25, 1899. Decided December 21, 1899.

Bill by Charlotte Flanagan against Howard Flanagan for a divorce. From a decree for complainant, defendant appeals. Affirmed.

Avery Bros. & Walsh (Sparling, Law & Moore, of counsel), for complainant.

William E. Leonard, for defendant.

MONTGOMERY, J. This is an appeal by defendant from a decree for divorce and alimony. The case was before this court for the purpose of having a review of a preliminary order. The decision of the former appeal is reported in 116 Mich. 185. The case has since been heard before the court, and the decree passed for the complainant, with an allowance of \$400 permanent alimony.

- It is contended that no marriage between the parties was proven; that, the marriage being in dispute, the

question should have been tried by a jury, under the provisions of section 444, 1 Comp. Laws 1897; and that there was a settlement between the parties which concludes complainant.

As to the question of procedure, it should be stated that the defendant made no demand or request that the issue as to the marriage be submitted to a jury, and must, therefore, be held to have waived the right, as was held in *Schafberg v. Schafberg*, 52 Mich. 429. See, also, *Maier v. Wayne Circuit Judge*, 112 Mich. 491.

On the former appeal it was insisted that no valid marriage existed between the parties, but, after a review of the cases upon which defendant now chiefly relies, Chief Justice GRANT held that proofs were necessary to determine what the relations of the parties were. Such proofs have now been had, and the circuit judge has found that in September, 1885, a marriage ceremony was performed between the parties, and that they continued to live and cohabit together from that time forward; that complainant knew that defendant had been previously married, but was told by him that he was divorced; that in 1893 defendant was for the first time divorced from his first wife, and that this came to the knowledge of complainant; that she then insisted on a new marriage ceremony, but defendant insisted that a new marriage ceremony would create a scandal; that it was not necessary; that they would treat the former marriage as binding; that they did continue to live together as husband and wife until December, 1896; and that the defendant introduced the complainant as his wife, and had her join with him in executing legal instruments, in which she was designated as his wife. The circuit judge was evidently of the opinion that there was an agreement to take each other as husband and wife, made after the former divorce, and that this made a valid marriage. In this view he is sustained by our former holdings. *Hutchins v. Kimmell*, 31 Mich. 126 (18 Am. Rep. 164); *Peet v. Peet*, 52 Mich. 464; *Flanagan v. Flanagan*, 116 Mich. 185.

The alleged settlement was not made under such circumstances as would justify a court of equity in enforcing it. The decree will be affirmed.

The other Justices concurred.

PEOPLE v. LONSDALE.

1. MANSLAUGHTER—ABORTION—DYING DECLARATIONS.

Where a physician, who visited deceased 11 hours before her death, found her suffering from the effects of an abortion, and informed her that she was a very sick girl, and that he could promise her nothing in the way of recovery, but would do all that could be done under the circumstances, and deceased, appearing to realize her condition, told the physician, in answer to a question as to the cause of her sickness, that respondent produced the abortion by means of an instrument, the statement implicating respondent was properly admitted, on a prosecution for manslaughter, as a dying declaration. LONG, J., dissenting.

2. SAME—INTENT—DISTINCT OFFENSE—IRRELEVANT TESTIMONY.

Upon a prosecution for manslaughter, where the evidence is conclusive that a criminal abortion was procured, the issue is whether or not the respondent procured the abortion, the guilty knowledge or intent of the person committing the crime being deducible from the crime itself; therefore, testimony as to what respondent did when applied to upon a certain occasion to produce an abortion upon witness, offered for the alleged purpose of showing the intent, is irrelevant, and its admission reversible error.

Error to recorder's court of Detroit; Chapin, J. Submitted October 26, 1899. Decided December 21, 1899.

Alice G. Lonsdale was convicted of manslaughter, and sentenced to imprisonment in the Detroit house of correction for five years. Reversed.

122	388
s81W	277
129	*102

122	388
139	*686
e140	*217
122	388
d141	*314

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157	*113

Orville B. Cragg (*Philip T. Van Zile*, of counsel),
for appellant.

Allan H. Frazer, Prosecuting Attorney, and *Henry A. Mandell*, Assistant Prosecuting Attorney, for the people.

GRANT, C. J. Respondent was convicted of the crime of manslaughter by abortion. The theory of the prosecution was that on February 21, 1899, the respondent used an instrument for the purpose of procuring the abortion; that the womb was perforated; that deceased aborted on the morning of the 21st; and that she died at 5 o'clock on the 23d. That an abortion had been committed was conclusively established.

1. The first error alleged is the admission of the dying statement of the deceased that the respondent committed the act. The objection is that it does not appear that the dying declaration was made under a sense of impending death. The decisions upon this subject are many. See *People v. Knapp*, 26 Mich. 116; *People v. Olmstead*, 30 Mich. 431; *People v. Beverly*, 108 Mich. 509; *People v. Weaver*, Id. 649; *People v. Simpson*, 48 Mich. 477. The mother of the deceased testified that the daughter was ill on the morning of the 22d; that later in the day she had pains and cramps; that she vomited, was feverish, and looked very ill. Dr. Day was sent for in the evening, but was unable to come until about 6 o'clock on the morning of the 23d. The doctor testified that on entering the room he formed his opinion very quickly, from the odor, that the girl had blood poison, brought on by an abortion. Her pulse was between 130 and 140; her temperature 103 or 104; her condition very low.

“ Q. Did you communicate to her her condition ?

“ A. I told her that she was a very sick girl, and that I was surprised to find her in that condition; that under such circumstances I could promise her nothing in the way of recovery, but that I would simply promise to do all that medical skill was able to do under the circum-

stances; and that it would be impossible for me to properly treat her in her own house, and that she would have to be taken to the hospital for proper treatment.

"Q. Did she seem to realize that she was liable to die?

"A. Yes, sir.

"Q. How did she look?

"A. She looked like a person dying.

"Q. Then?

"A. Then; yes, sir.

"Q. Did she appear to realize it after you told her this?

"A. Yes, sir.

"Q. Did you ask her then any questions as to the cause of her sickness?

"A. I told her that, considering the grave condition in which I found her, that it was only fair and right that she should tell me how she happened to get in such a condition."

The deceased then told the doctor that the respondent produced the abortion by means of an instrument.

The girl was removed to the hospital about 8 o'clock that morning, and died at 5 in the afternoon.

Greenleaf says:

"It is enough if it satisfactorily appears, in any mode, that they [dying declarations] were made under that sanction [impending death], whether it be directly proved by the express language of the declarant, or be inferred from his evident danger, or the opinions of the medical or other attendants stated to him, or from his conduct, or other circumstances of the case." 1 Greenl. Ev. § 158.

The admission of dying declarations forms an exception to the law of evidence, and is now confined to cases of homicide. Their admission is based —

"Upon the ground of the public necessity of preserving the lives of the community by bringing manslaughterers to justice. For it often happens that there is no third person present to be an eye-witness to the fact; and the usual witness in other cases of felony, namely, the party injured, is himself destroyed." 1 Greenl. Ev. § 156.

When there is evidence to show that they were made *in extremis*, they are admissible, and the weight to be given to them in each case is the province of the jury.

In *People v. Knapp*, this court, speaking through Justice CAMPBELL, said :

“Their value depends on their intrinsic probability, and the candor and truthfulness of the person making them, as well as upon the fullness and fairness with which they are taken and reported. Where they are taken under suspicious circumstances, or drawn out by doubtful means, they are not excluded, but go to the jury for what they are worth. The whole admission is from necessity,—the witness having passed away,—and the objections are therefore confined to the weight and value of the declarations.”

The language of the court, speaking through Justice MARSTON, in *People v. Simpson*, at pages 477, 478, 48 Mich., is applicable here. This language is quoted with approval in *People v. Weaver*, at page 651, 108 Mich.

The reason for admitting these declarations is especially applicable to cases of abortion, where usually only two parties have knowledge of the crime,—the abortionist and the person upon whom the abortion is produced. While this is no reason for relaxing the rule that they must be made in view of impending death, yet it is a reason why appellate courts should be slow to reverse the holding of the trial judge, who saw the witnesses, and can better judge of their truthfulness and of the surrounding circumstances. We think there was sufficient evidence, within the former rulings of this court, to justify the admission of the declaration.

2. The prosecution introduced the testimony of a witness to show that she had applied to the respondent to have an abortion produced upon her. The testimony was very weak, and was evidently that of an unwilling witness. However, there was sufficient in it to show the purpose of the woman's visit, and that some acts were done towards the accomplishment of that purpose. The attorneys for the people justify this testimony on the ground that it tended to prove guilty knowledge or intent, and rely upon *People v. Seaman*, 107 Mich. 348 (61 Am. St. Rep. 326). This case is not within the rule there announced, or

within the authorities there cited. This case does not form an exception to the general rule of evidence. Where the intent or guilty knowledge is a necessary conclusion from the act done, proof of other offenses of a similar character is inadmissible, and violates the rule that the evidence must be confined to the issue. Upon the record, there is no room for an inference that death resulted from accident, or that the operation was performed to save the life or health of the deceased. On the contrary, if the jury found that the dying declaration of the deceased was true, the crime was complete, and the jury could not find otherwise than that it was done with guilty knowledge and intent. This testimony should have been excluded, and for this reason the conviction must be set aside.

3. Error is assigned upon a remark of the prosecuting attorney during the taking of testimony. The remark was highly improper, but no more so than the remark made by the attorney for the respondent which provoked it. Whether the remark was sufficiently prejudicial to justify a reversal, we need not determine, as the case is reversed upon another ground. We are constrained to say again that such conduct in the trial of causes, especially criminal ones, is discreditable to attorneys; and the courts should, without waiting for objections, promptly suppress the language and reprimand the attorneys.

Reversed, and new trial ordered.

MONTGOMERY, HOOKER, and MOORE, JJ., concurred with GRANT, C. J.

LONG, J. I concur in reversing the judgment on the ground stated by my Brother GRANT, but I am of the opinion that the testimony given on the trial did not establish the fact that the so-called dying declaration was made under such circumstances that it became competent evidence. It seems to me that there is no testimony showing that the declaration was made under the fear of death.

DAVIS v. McLAULIN.

MALICIOUS PROSECUTION—PROBABLE CAUSE.

On a payment of rent, a controversy arose between the tenant and defendant, the landlord. The tenant demanded a return of rent he had just paid, or a receipt. Defendant started to leave the premises, when the tenant assaulted him, and plaintiff, coming to the tenant's assistance, to prevent defendant from getting into the street, pushed him back. Defendant sued them by *capias* for the assault, and judgment was rendered of no cause of action. Plaintiff then sued for malicious prosecution. *Held*, that the court should have charged that defendant had probable cause for instituting the suit.

Error to Wayne; Hosmer, J. Submitted October 27, 1899. Decided December 21, 1899.

Case by William Davis against John D. McLaulin for malicious prosecution. From a judgment for plaintiff, defendant brings error. Reversed.

James H. McDonald, for appellant.

James H. Pound, for appellee.

GRANT, C. J. The plaintiff and his brother, John, were convicted of an assault and battery upon the defendant. After that conviction, defendant brought suit against plaintiff and his brother by *capias*. Trial was had, and verdict rendered of no cause of action. Plaintiff then instituted this suit for malicious prosecution, and recovered a verdict and judgment for \$400. The court left it to the jury to determine whether there was probable cause for issuing the *capias*, and held that the conviction for assault and battery was conclusive of probable cause in the criminal case. It is insisted by the defendant that he fully and fairly stated all the facts in the case to his attorney,

that the same attorney was present upon the trial for assault and battery, and there heard all the facts and circumstances of the assault. After such information by the defendant, and the attorney's knowledge gained upon the criminal trial, defendant was advised by his attorney that he had a good cause of action for damages, and for issuing the writ of *capias*. The order to hold to bail was duly indorsed upon the affidavit for the writ. Both the plaintiff and his brother, John, testified upon this trial that they were witnesses in the criminal prosecution, and there stated all the circumstances of the case. Defendant was also a witness upon that trial, and gave his version of the transaction. In my judgment, therefore, it conclusively appears that defendant's attorney was in possession of all the facts in the case, both from the defendant and from the plaintiff and his brother. There is no testimony in this record to show that defendant did not truthfully state all the material facts to his attorney. The details of the trial brought by defendant for damages are not before us, and we have no means of determining the basis of the verdict of the jury. I think it conclusively appears in this record, from the testimony of plaintiff and his brother, that they were both guilty of an unjustifiable assault upon the defendant. Plaintiff's brother was a tenant of defendant, who, on the occasion of the controversy, went to the shop to collect the rent. John paid him \$16. This was not the full amount of the rent due. John claimed that he had paid \$4.50 for certain repairs, which he insisted made up the difference. Defendant denied his liability for repairs, and refused to allow it. Defendant had taken the money, and put it in his pocket, and started to go out the door without giving a receipt. John's version as to what happened is as follows:

"I said I wanted a receipt for the money, which he had already put in his pocket. He's always putting the money in his pocket first. Mr. McLaulin started out of the door. I said, 'You come back and give me a receipt for that money, or hand that money back.' He kept on moving,

and I jumped the counter just as he got to the doorway. I grabbed him. 'Now,' I said, 'you either give me that money back or give me a receipt.' Just as I grabbed him, he raised his hand and struck at me, and I struck him several times somewhere around the face. He kind of came down on his knees. I took him then by the shirt collar, and told him to come right in and give me a receipt, or else give me the money back. * * * This happened just outside the door. * * * McLaulin had some blood on him after we got through. His collar was fairly broken away."

During the conversation between John and defendant, plaintiff had entered the shop, and heard some of the dispute. Plaintiff admits that he ran after defendant to prevent his leaving. His testimony is as follows:

"The only thing I did was to prevent McLaulin from leaving the shop until that thing was settled. I did what I would do for any one that would come in and pick up any goods.

"Q. Tell us just what you did in preventing him from leaving the shop.

"A. I got between the sidewalk and him, and prevented him from backing off into the street. I stood in his way. I never hit him. I just stood in his way, and prevented him coming into the street.

"Q. What did you do? Push him back into the shop?

"A. Well, if he got against me, I was not going to let him push me back.

"Q. Did he come against you?

"A. Yes, sir. [Continuing:] I prevented him from getting away from the shop, but I did nothing but press against him; that is, I stood between him and the street. My brother was in front of him, trying to pull him back.

"Q. So that your brother, John, was pulling him into the shop, and you were pressing him in, and both of you had hold of him?

"A. I did not have hold of him. I may have put my hands on him to push him there, but I did not grapple with him, strike him, or grab him."

Under this testimony, plaintiff was guilty of an actual assault. Plaintiff and John had no legal right to assault and detain the defendant to compel him to either give a

receipt or surrender the money. If defendant was liable for the repairs, the rent was paid. If he was not liable, it was not paid. In either event, defendant lawfully retained the money, and the rights of the parties could have been adjusted in a civil suit. Resort to force was unnecessary, illegal, and unjustifiable.

The facts were undisputed. The question, therefore, was one of law for the court, and not for the jury. The court should have instructed the jury that defendant had probable cause for instituting the suit, and should have directed a verdict for the defendant.

Judgment reversed, and new trial ordered.

The other Justices concurred.

JOURNEAUX v. E. H. STAFFORD CO.

1. MASTER AND SERVANT—DANGEROUS MACHINERY—ASSUMPTION OF RISK.

A factory employé who tripped and fell upon a small circular saw, the edge of which extended about 2 inches above the surface of an equalizing machine, in which it was set at a place 18 inches from the front, 26 inches from the rear, and 8 inches from the edge of the table of such machine, cannot recover from his employer for his injuries, where it appears that he was acquainted with the situation, and had been warned of, and appreciated, the danger of coming in contact with the saw; the risk being assumed by him as incident to his employment.

2. SAME—SCREENING SAWS—DUTY OF MASTER.

A manufacturer is under no legal duty to provide guards or screens for all machinery the contact with which would be dangerous, where employés are warned of the danger, and are given room to carry on with reasonable safety the work they are expected to perform.

3. SAME—CUSTOM AMONG MANUFACTURERS—EVIDENCE.

A general custom among manufacturers of screening the

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s81NW	259
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153	1177

small circular saws in use on equalizing machines is not shown by the testimony of a single witness that it is customary to screen such saws, and that he has seen screening devices in use on equalizing machines in another State, but never in this State.

Error to Muskegon; Russell, J. Submitted October 27, 1899. Decided December 21, 1899.

Case by John Journeaux, an infant, by Mary Journeaux, his next friend, against the E. H. Stafford Company, for personal injuries. From a judgment for plaintiff, defendant brings error. Reversed.

The following statement of facts is taken substantially from the defendant's brief, and is not disputed by the plaintiff: The injury of which plaintiff complains occurred on the 30th of December, 1898, and during his employment at defendant's factory. He was 15 years old on the 7th of April, 1899, and was employed on the written application of his mother, his father being dead. His ordinary work was to carry material which had passed through a small planing machine, called a "sticker," from the machine to a place of temporary deposit. In the same room was what is known as a "combination machine," sometimes called an "equalizer," and which was operated by one Lewis, an employé of defendant. This machine was located near the southwest corner of the room, 4 feet from the west wall. The machine is in two sections, each 4 feet 4 inches long, 2 feet 5 inches wide, and 36 inches high. The section complained of was at the time of the accident provided with a small circular saw, placed 18 inches from the front, 26 inches from the rear, and 8 inches from the westerly edge of the table of the machine, its upper edge extending far enough (about 2 inches) above the surface to do the work required. At the time of the accident it was being operated on small boards, 20 inches long, 15 inches wide, and $\frac{3}{4}$ of an inch thick. The operator, Lewis, had been doing this kind of work, him-

self carrying the pieces to a table near the southwest corner of the machine, before the plaintiff went to assist him, and, when plaintiff went to him, was nearly through with that work. The plaintiff knew the danger of his surroundings, and was instructed how to do his work, to be careful not to come in contact with the saw, and not to touch anything until the pieces being operated upon had passed the saw. He had avoided coming in contact with the saw all that day, and at other times while at work there he had been careful to avoid it. Before the plaintiff commenced this particular work, he had seen Lewis carry the material, after it had been worked, to a little table near the north end of the machine. He knew that ordinarily the pieces constituting a lot were kept together, and that it was necessary to take the pieces he carried to the same place to which Lewis had taken a part of the same lot, and he did so a part of the time; but at the time of the accident he was engaged in carrying three pieces from the rear of the machine to a place back of Lewis, making it necessary to go between the machine and the wall. The change by plaintiff of the place of deposit was on his own motion, and without instruction from any one. Near the north end of the machine was a slight rise of the floor, about 1 inch; and plaintiff says that he stumbled on this rise of the floor, and fell so that his left arm came in contact with the saw 8 inches from the edge of the table of the machine; that he was then carrying three pieces, having placed one on another, and having taken hold of the ends, with one edge resting against his body, his elbows extended, and raised to a height a little higher than the top of the surface of the table of the machine. He was perfectly familiar with the rise in the floor. But this is not the subject of complaint. He could see the saw plainly, and knew it was running. He also knew that if he stumbled so that his arm, in the position described, came in contact with the saw, he would get hurt. He had worked in that room about four months. He was injured at 5:30, and had been engaged at that machine all

day, and had worked at it about two months before, but how long he does not state. Why he walked so near the machine is unexplained. The negligence claimed is the failure to provide a hood, screen, or device for protecting the saw so that persons employed upon or about the machine could not come in contact with the saw. The only material fact about which there is any dispute is whether plaintiff was carrying the pieces of board at the time he was injured. The testimony on the part of the defendant tended to show that he was not. Plaintiff recovered verdict and judgment.

Smith, Nims, Hoyt & Erwin, for appellant.

Turner & Turner and *Cross & Lovelace*, for appellee.

GRANT, C. J. (*after stating the facts*). Plaintiff was a very intelligent boy; had been employed in this room in similar work for four months; fully comprehended the situation, the danger, and the necessity of keeping away from the saw; had a space of 4 feet within which to carry boards 15 inches wide; had been duly cautioned of the dangers and care required of him about his work; had worked before at this particular machine; and had nearly completed this day's work with safety. There is no room for claiming, nor is it claimed, that he was inexperienced, unintelligent, or so young as not to appreciate the situation. There was no unknown or latent danger into which he was sent. The accident was not one which a prudent man would probably anticipate or provide against. Plaintiff's fall was either the result of his own want of care, or else was purely accidental. There was no danger from the side of the machine. No injury could come to the plaintiff unless he got his arm on the table of the machine, 3 feet from the floor, and on the saw, 8 inches from the side. Such an event was not probable.

The court instructed the jury as follows:

"Now, it is claimed on the part of the defendant here

that when this young man went in there, and looked the surroundings over, and saw the saw and the table, and the surroundings, and the work that was to be done, and all that sort of thing, that from his own testimony, and from his ability and experience, he knew the dangerous character of the saw,—in fact, that he took in the situation, and that he knew all of the danger and all of the surroundings in connection with this machinery and the work that he had to do; that he appreciated it fully. Now, if you find that that is true, gentlemen, why, of course, he cannot recover here, because he had a perfect right, if he desired to do so, to go there and work with a saw that had not any hood on,—one that was dangerous,—if he understood the entire surroundings. If he did that, as I say, he cannot recover.”

The plaintiff's own testimony showed that he saw the situation, had been instructed in his work, and had been warned of and appreciated the danger. He therefore assumed the risk. The case is clearly within the following decisions: *Sjogren v. Hall*, 53 Mich. 274; *Lindstrand v. Lumber Co.*, 65 Mich. 254; *Fort Wayne, etc., R. Co. v. Gildersleeve*, 33 Mich. 133; *McGinnis v. Bridge Co.*, 49 Mich. 466; *Richards v. Rough*, 53 Mich. 212; *Schroeder v. Car Co.*, 56 Mich. 132; *Borck v. Nut Works*, 111 Mich. 129; *Prentiss v. Manufacturing Co.*, 63 Mich. 478.

The facts were undisputed, and the court should have directed a verdict for the defendant. The danger was open and apparent to all. Defendant had provided sufficient room around the machine wherein plaintiff could work with safety. Manufacturers are under no legal duty to provide guards or screens to machines of this character, where they have left sufficient room to carry on the work around them, and have duly instructed their employes in such work, and warned them of the dangers attending it. To hold otherwise would be to require all machines, the contact with which would be dangerous, to be provided with guards or screens, and to require the use of every possible safeguard against accident. The authorities do not so hold. There is always more or less danger

in operating and working around machines like that in use by the defendant. It is a part of the employé's contract that he assumes that danger. *Sullivan v. Manufacturing Co.*, 113 Mass. 396.

It is urged that plaintiff introduced testimony to show the common use of screens or hoods over machines of this character for the purpose of protection to those working in the position of plaintiff. One witness was produced to show such custom. He testified that he had seen those devices on machines in factories in Mishawaka and Elkhart, Ind., where he had worked, and that he had also been in a great many other factories. He then testified:

"It is the custom in factories of this kind to protect saws of this character, as a general rule, by splitters; and, if they have no guard over the top of the saw (that is, a patent guard), they have an iron bent over on which they hang a lever to arrest the dust from flying in the man's eyes that is in front of the saw."

From this testimony it would appear that the object of the screens and hoods is to protect the person standing in front of and operating the saw. After asking the witness if, in his opinion, plaintiff would have been injured if the machine had been thus protected, and eliciting the answer, "If there had been anything there, any protection at all, it would have been impossible for him to get onto the saw," his attorney put the leading question: "Is that the main object for which these devices are used, or one of the objects?" Witness answered, "Yes." On cross-examination the witness testified as follows:

"Q. I understand you to say that it is customary to use a screen or hood, or some device, on machines of this character,—equalizing machines?

"A. I said it was customary to use it on all rip-saws.

"Q. Is it customary to use a screen, hood, or other protection to the saw on an equalizing machine?

"A. It can be used on equalizing machines.

"Q. Will you kindly answer my question?

"A. I have seen it used on equalizing machines.

"Q. Will you please answer my question?

"A. Yes, sir.

"Q. You say it is customary?

"A. Yes, sir.

"Q. Why hesitate about answering it?

"Mr. Lovelace: Because you would not let him explain it.

"Q. I didn't ask for any explanation. Maybe he can tell why he hesitates, as well as counsel.

"A. I would like to explain these things. I like to explain them just as they are.

"Q. I understand you to say it is customary to use these screens, hoods, or other devices on equalizing machines?

"A. I have seen them used on equalizing machines in different factories.

"Q. Do you understand my question?

"A. Yes, sir; I do.

"Q. Do I understand you to say now that it is customary to use them on equalizing machines?

"A. When they are used as a rip-saw, it is.

"Q. And you have seen them on equalizing machines in Michigan?

"A. No, sir; I never saw them in Michigan."

The testimony fails to sustain the claim that these devices are in common use on machines like this one, or that they are designed to protect those who are employed in carrying material to and taking it away from the machine, and who have ample room provided for the work without coming in contact with the saw. The machine was used for a variety of work. Defendant gave evidence tending to show that some of this work, such as grooving, could not be done on the machine if provided with the device, and that its presence would interfere with the operator, and materially affect the efficiency of the machine, on the kind of work then being done. Plaintiff makes no case for the application of the rule that railroad companies and manufacturers are required to adopt those inventions for the protection of their employes which are in ordinary use, and the failure to adopt which is negligence.

Judgment reversed, and new trial ordered.

The other Justices concurred.

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SHELDEN v. NATIONAL MASONIC ACCIDENT ASSOCIATION.**1. MUTUAL BENEFIT ASSOCIATIONS — ASSESSMENTS — WHEN PAYABLE.**

Where there is a question as to the time within which assessments levied by a mutual benefit association must be paid to prevent a forfeiture, its articles of association will govern, instead of by-laws adopted by the board of directors.

2. SAME—NOTIFICATION—SERVICE BY MAIL.

Where the articles of a mutual benefit association require its members to pay assessments within a given time after having been "notified," to prevent a forfeiture of benefits, and provide that mailing a notice shall constitute such "notification," time does not begin to run against a member until he receives the notice, or ought to have received it in the ordinary course of the mails.

3. SAME—PROOFS OF LOSS—DELAY—ESTOPPEL.

A mutual benefit association cannot take advantage of a delay in furnishing proofs of loss, occasioned by a neglect of duty on the part of its secretary in supplying blanks for such proofs after a request for the same by the beneficiary.

Error to Houghton; Haire, J., presiding. Submitted October 27, 1899. Decided December 21, 1899.

Assumpsit by Mary E. Shelden against the National Masonic Accident Association on a policy of insurance. From a judgment for plaintiff, defendant brings error. Affirmed.

Dunstan & Hanchette (O. B. Ayres, of counsel), for appellant.

R. Skiff Shelden (Gray & Looney, of counsel), for appellee.

LONG, J. This action is brought by the plaintiff, as beneficiary in an accident policy for \$5,000 issued by

defendant to plaintiff's husband on June 21, 1895. Mr. Shelden paid the defendant, at the time the certificate was issued, a membership fee of five dollars, which was all the fees and dues required to make him a member. He also paid all dues and fees to the defendant up to October 1, 1896. On the evening of that day he was shot on the streets of Houghton, this State, from which accident he died on the morning of the following day. It appears that on August 10, 1896, an assessment of three dollars was authorized by the company for the benefit fund in the division of which Shelden was a member. It was provided in the resolution for the assessment that notices of such assessment should be mailed to the members on or before August 31, 1896. The defendant company is located in Iowa, and its principal office is at Des Moines. Notice of the assessment was mailed to Shelden, at Houghton, Mich., from Des Moines, on or before August 29th, and it is claimed that it reached Houghton about September 1st. The notice reads as follows:

"OFFICE OF THE NATIONAL MASONIC ACCIDENT ASSOCIATION.

"DES MOINES, IOWA, September 1, 1896.

"A quarterly assessment of \$3 for the quarter beginning October 1, 1896, and ending January 1, 1897, payable before October 1, 1896, has been levied upon all members of division A of the association, * * * to be applied as follows: Benefit fund, \$2; expense fund, \$1; total, \$3.
* * *

"Payments should be made promptly. Lapsed certificates cannot be reinstated until payment is received by the secretary. Fill blanks, and return this notice with remittance to the undersigned, or pay to ———, Collector.

"Fraternally,

"J. A. DOVERMAN, Secretary."

Mr. William D. Calverly, a witness for plaintiff, testified that on October 1, 1896, he paid this premium demanded by the above notice to Harry Rice, cashier of the National Bank of Houghton; that he was the bookkeeper for Mr. Shelden, and had been since 1880, and had more

or less to do with the payments for Mr. Shelden of his insurance premiums, and had two, three, or four times paid premiums on this certificate to Mr. Rice for Mr. Shelden. Mr. Rice testified that he was the collector at Houghton for the defendant company, and had never been notified that his agency had ceased. The receipt given to Mr. Calverly for the three dollars paid on October 1, 1896, bears date October 1st, and Mr. Rice's name is signed to it, though Mr. Rice testified that it was not his signature. John Rees, who is the assistant cashier of the bank, and under Mr. Rice, testified that he signed Mr. Rice's name to the receipt, and received the money. It appears that this money was remitted by the bank, or Mr. Rice, to the defendant company, and that it has never been returned.

On the trial it was contended by counsel for defendant, and it is now contended here, that the payment made on October 1, 1896, was not in time, but that, under section 19 of the by-laws, and the resolution ordering the assessment, and under the notice of assessment, Mr. Shelden was bound to pay no later than midnight of September 30, 1896; that the payment on October 1st was too late, and the policy lapsed, and, the accident happening after that time, no recovery could be had. The notice has been set out herein. The resolution for the assessment reads:

“On motion of O. B. Ayres, an assessment was ordered made on all members of the association; the amount of said assessment to be \$2 for the benefit fund in division A, * * * and \$1 quarterly dues for the expense fund of division A. * * * Notice of said assessment to be mailed to said members on or before August 31, 1896, and to become due and payable during the month of September. * * *”

Section 19 of the by-laws reads:

“If any member shall fail to pay an assessment on or before the day so fixed for payment thereof, his certificate and membership shall cease to be of any force or effect, and can only be revived by payment as hereinafter provided. It is the privilege of any member to pay any

assessment in any year, and to thereby be entitled to benefits from the time when such assessment is paid until the next assessment becomes due; but no benefits of any kind can accrue or be paid for or on account of any injury received by the member between the time when any assessment became due and the time when the same or some subsequent assessment is received by the secretary at his office; and no requiring of any subsequent assessment of such delinquent member, or notifying him of any assessment, nor any receipt of any assessment after the same has become due, shall in any way alter, change, or affect this rule."

It appears that it was after this assessment became due and payable, and before the assessment was actually received by the secretary at his office in Des Moines, Iowa, that Mr. Shelden received injuries which proved fatal; that is, the assessment was not received by the secretary at Des Moines until October 5, 1896, and Mr. Shelden was injured on the evening of October 1st. As has been stated, however, the assessment was paid to Mr. Rice at the bank some time during the day of October 1st, and before the injury. The court below charged the jury upon this question as follows:

"I instruct you that if you find from the evidence, however, that Mr. Shelden had been in the habit of paying his dues and assessments to Mr. Rice, or any other person connected with the bank at Houghton, and that the association knew this, and received such dues from and through Mr. Rice or such other person connected with the bank, and made no objection to Mr. Shelden of such payment, and that Mr. Shelden had not been notified by the association not to make any further payments to Mr. Rice or any other person, or that such payments should be made to the secretary at his office, then the payment of October 1, 1896, although made after the regular time, would have the effect of restoring Mr. Shelden to all the benefits attaching to his membership in the association, the same as if such payment had been made in time. I further instruct you that simply leaving out the name of the collector in the notice of assessment which the undisputed evidence shows was made by the secretary of the association, and mailing to Mr. Shelden, would not be

sufficient or proper notice to Mr. Sheldon to deprive him of the right to make such payment to Mr. Rice, or such other person or corporation. On the other hand, I charge you that if you find from the evidence that said George C. Sheldon, at or before the payment was made on October 1, 1896, knew or had notice that a payment made on that day would not take effect until actually received by the secretary of the defendant at Des Moines, Iowa, then you should find that the payment was not made in time, and in that event you will find for the defendant. In other words, if Mr. Sheldon had notice that this was not the proper place to pay the assessment, then, in that event, if you find such to be the fact, you will find in favor of the defendant. That is all I have to say upon the question of payment. If you find on the question of the payment of dues in favor of the defendant, you need go no further in the case; simply return a verdict for the defendant. If you find in favor of the plaintiff on that point, you will then consider the next question."

The defendant contends that the court was in error in this part of the charge, and that, under the facts shown, the court should have directed the verdict in favor of defendant. On the other hand, it is contended by counsel for plaintiff that this by-law has no such force as claimed; that the articles of association must govern; and attention is called to section 8 of article 8, which reads:

"Any member failing to pay his assessment or dues within thirty days after having been notified shall forfeit all his right to benefits. Mailing a notice to his post-office address as shown by the books of the association shall constitute such notification."

Counsel for plaintiff contend that it is not necessary to inquire whether the by-laws affect this provision, for these articles can be changed by the members only, while the by-laws are made and may be amended by the board of directors; that the above section of the articles of association contemplates that the member shall have 30 days after being notified in which to make his payment of assessment for benefits; and that the words of this section, "after having been notified," mean that he shall have 30 days after

he has received the notice, or 30 days after a notice mailed to him would reach him in the ordinary course of mails, and not that he shall have only 30 days after the day of mailing the notice.

We think the contention of the defendant cannot be sustained; that section 8 of article 8 of the articles of association must govern the question. Where notice of a stated number of days is required (that is, that a member shall be informed) before the forfeiture of a right to membership can take place, it cannot be said that the time can be counted from the time when the notice is dated, or when the notice is placed in the post-office, addressed to the member. In *Castner v. Insurance Co.*, 50 Mich. 273, the language of the charter was that the member was to be "notified, by the secretary or otherwise, either by circular or a verbal notice." It was contended by the insurance company that mailing a notice of assessment, prepaid, and directed to a member, was a sufficient compliance with the charter of the company. The court said:

"The consequences to flow from this notification are admitted to be important. A fixed personal liability is to depend upon it; and, further, in case of failure to respond by payment of the sum assessed, as communicated by the 'notice,' during a given number of days, the member is to stand unprotected by his policy, and wholly without remedy or redress in case of loss. In principle it is not easy to distinguish the nature of the required notification from the office and object of service of process, and there would seem to be as much reason for real notice in the case in question as in the case of an action. The destruction of a mail, or accidents preventing the delivery of matter, or even a considerable delay, might at any time, without fault of the persons insured, eventuate in widespread loss and injustice. No construction open to so much objection should be admitted unless rendered necessary by the terms of the charter; and they do not require it. On the contrary, they contemplate that the members shall have real information of the assessment. The provision is not that notice or information shall be mailed, or sent, or forwarded. The members are to be 'notified,'—

that is, informed; to have made known to them the fact of the assessment; and this is permitted to be done either by oral statements to the members, or by delivery to them of written statements through the agency of the post-office, or some other. It follows that the second ground of defense cannot be supported."

See, also, *Protection Life Ins. Co. v. Palmer*, 81 Ill. 88.

It is true that, where service is the principal thing, and it is provided in the charter or by-laws that service may be made by mail, then so depositing the paper addressed to the member will be sufficient. In *Ross v. Insurance Co.*, 83 Iowa, 586, it appeared that the statute of Iowa provided for notice to an assured by the company of the maturity of his premium note, and declared that "such notice may be served either personally or by registered letter addressed to the assured at his post-office address named in or on the policy; and no policy of insurance shall be suspended for nonpayment of such amount until thirty days after such notice has been served." It was held that service was complete, and the 30 days began to run, as soon as the letter was mailed as provided by law. The court said, "It is the *service*, and not *notice*, that gives rise to the operation of the statute." In the present case, however, there must be *notice* before a forfeiture can take place. There is great and apparent necessity for notice of the levying of an assessment. Assessments are levied only when needed, and the officers of the company are the ones who are to determine this necessity. A member cannot be put in default for not paying his assessment until he is notified as provided by the charter. We think the payment of the assessment on October 1st was in time after notice was received. We need not discuss the question whether the court below was right or not in its conclusions upon this subject, as the jury have found for the plaintiff.

It is also contended by the defendant that, the proofs of death not having been forwarded to the company within

30 days after the death of Mr. Sheldon, the plaintiff could not recover. The court charged the jury upon that subject as follows:

"The defendant claims that, under its by-laws, proof of the death of Mr. Sheldon must have been received by it within 30 days after such death, and that the proofs in this case were not so received; and, gentlemen, it is a fact that they were not received within 30 days after the death of Mr. Sheldon. That, as I said before, is undisputed. That is one of the laws of the association as laid down by the by-laws, and must govern, unless it is waived by some other provision. The general rule is that such a stipulation in the by-laws or in the insurance contract must prevail; but this rule is subject to several exceptions, one of which is that, if the delay in serving such proof is in any way attributable to the insurer, the penalty or forfeit provided for default in this respect shall not be imposed. There is testimony in the case in regard to the duty of the secretary, under the by-laws, to furnish blanks for proofs of death after receiving notice of the injury or death of the member, and testimony as to a demand of plaintiff for such blanks, and the time when they were furnished, and the kind furnished, in response to such demand; and I charge you that if you find from the evidence that the alleged delay in furnishing proofs of death within the time required by the by-laws was to any extent, or in any way attributable to the defendant association, then the defendant association waived strict compliance with the by-laws in that regard, and the penalty therein fixed for delay in furnishing proofs could not now be imposed; in other words, that the proofs were, as a matter of law, served and furnished in due time, provided that you also find, gentlemen, in connection with that, that plaintiff herself, or her representative, used no more time than was necessary to procure the proofs after they had received the blanks in question. If you find, however, that they used more time than necessary; that they, by using reasonable diligence, could have procured proofs after receiving the blanks from the secretary,—then you will find in favor of the defendant, because they did not reach there in time, and it was owing to their own negligence, if you do find that to be the fact."

The proofs of death were not served on the company until November 2, 1896. This was one day over the 30

days provided by the by-laws, and we think the court very properly left the question to the jury to determine where the fault rested.

We have examined this record with some care, and find no error. The other assignments of error need not be discussed.

The judgment must be affirmed

The other Justices concurred.

PEOPLE v. THOMPSON.¹

1. GRAND JURY—CHALLENGES—INDICTMENT—PLEA IN ABATEMENT.

Upon a plea in abatement to an indictment, only those objections going to the competency of jurors can be raised which, under 3 Comp. Laws 1897, §§ 11881, 11882, would have been good ground for challenge, viz., that a juror was prosecutor or complainant.

2. SAME—NUMBER OF JURORS—WAYNE COUNTY JURY ACT.

Section 23 of the Wayne county jury act (Act No. 95, Pub. Acts 1887), which provides for drawing the names of 23 persons to serve as grand jurors, was not designed to modify the general law (3 Comp. Laws 1897, § 11879), under which " not less than 16 persons " are required " to be sworn " on any grand jury; therefore, an indictment found in Wayne county is not invalid because the jury returning it was composed of only 21 persons.

3. SAME—PROCEEDINGS—SECRECY—STIPULATION.

Since public policy forbids a prosecuting officer to divulge his knowledge of what testimony was taken before a grand jury as the basis for an indictment, the courts will refuse to consider a stipulation purporting to set out such testimony, and signed by the prosecuting attorney, though pre-

¹ Respondent's application for a rehearing upon the question whether he was entitled to a directed verdict was denied April 3, 1900.

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sent for the purpose of expediting the hearing on a plea in abatement.

4. CRIMINAL LAW—MANSLAUGHTER—BOILER EXPLOSION—CAUSE—QUESTION FOR JURY.

On the trial of an indictment for manslaughter, charging that the killing resulted from a steam-boiler explosion, caused by overpressure of steam, due to the willful negligence of the respondent in failing to regulate the safety-valve, and in leaving the boilers unattended, where experts' testimony that the explosion was due to the causes alleged was contradicted by respondent's witnesses, who testified that the explosion was due to other causes, and that the respondent could have done nothing to avoid it if present, it was proper to submit the issues raised by the testimony to the jury, though the people's witnesses did not have that technical scientific knowledge possessed by the witnesses for the defense.

5. SAME—TRIAL—COMPETENCY OF EVIDENCE—INSTRUCTIONS.

Where testimony which was inadmissible except for a single purpose was received throughout a criminal trial under rulings which were calculated to give the jury an erroneous impression, prejudicial to respondent, as to the purpose for which it was competent, the error was not cured by an obscure reference in the general charge to its proper purpose.

6. SAME—PROOF OF OTHER OFFENSES—NEGLIGENCE—INTENT.

On the trial of an engineer for manslaughter in leaving steam-boilers unattended until the high pressure produced an explosion causing death, where respondent denied that his absenting himself on the occasion in question was negligent, it was error, to admit proof of other occasions when he had negligently left the boilers unattended, since negligence could not be inferred from his conduct on prior occasions, and the case was not one for characterizing the intent by such proof. *People v. Seaman*, 107 Mich. 348, distinguished.

7. SAME—WARNINGS.

It was proper, however, as bearing upon the question of respondent's recklessness on the occasion in question, to show that he had been warned that danger would follow his absence from the boiler-room.

8. SAME—FUEL FOR BOILERS—COMPARISONS.

On the trial of an engineer for manslaughter in leaving unattended steam-boilers, under which oil was used for fuel, until the high pressure produced an explosion causing death, it was error to admit evidence of comparisons between the use of

coal and oil for generating steam, since a showing of how quickly steam may be raised with coal affords no light as to one's duty in attending boilers fired with oil.

9. SAME—EXPERT TESTIMONY—EXPERIMENTS—IDENTITY OF CONDITIONS.

Upon such prosecution, however, where an expert had given his opinion as to the cause of the explosion, it afforded no ground for excluding his testimony, in support of the opinion as to the results of experiments made by him to ascertain within what time a given pressure of steam could be raised in a boiler by the use of oil as fuel, that the conditions under which the experiments were made were not identical with those existing with respect to the exploded boiler.

10. SAME—EVIDENCE.

While it was not error, upon a prosecution for manslaughter in leaving steam-boilers unattended until the pressure produced an explosion causing the death of a person named in the indictment, to show that other persons were killed or injured by the explosion, it was improper to admit testimony in regard to the injured persons' being taken to hospitals, and detained there for a long time.

11. SAME—INSTRUCTIONS.

Where respondent in a prosecution for manslaughter was accused of negligently leaving steam-boilers unattended until the pressure produced an explosion causing death, he was entitled, in addition to the general charge, in the main correct, as to what would amount to culpable negligence, to have given a requested instruction that if he had reason to believe, and did believe, from his past experience, that it was consistent with safety for him to be absent from the boilers at the time, he could not be held guilty of the crime.

Exceptions before judgment from recorder's court of Detroit; Chapin, J. Submitted October 26, 1899. Decided December 21, 1899.

Thomas M. Thompson was convicted of manslaughter. Reversed.

Otto Kirchner, for appellant.

Allan H. Frazer, Prosecuting Attorney, and *Ormond F. Hunt*, Assistant Prosecuting Attorney, for the people.

MOORE, J. The respondent was tried and convicted of manslaughter, in the recorder's court of Detroit, on an indictment found in the circuit court for the county of Wayne. The case comes here on exceptions before judgment.

The respondent was, in November, 1895, an engineer having charge of two boilers and other machinery in a building on Larned street, in Detroit. On the morning of the 6th of November one of the boilers exploded with terrific force, destroying the building in which it was located. As a result of the explosion, a number of lives were lost. Among the killed was Michael Ward. The grand jury of Wayne county was then in session. In the following January an indictment was found against the respondent. A motion to quash the indictment for various reasons was made and overruled. Thirteen pleas in abatement were then filed. These pleas and motion to quash attacked the validity of the indictment for various reasons, the most important one of which is that the act creating the jury commission is unconstitutional and void, because in the body of the act certain powers are conferred upon the circuit judge, the sheriff, and the clerk in carrying out the provisions of the act, which powers are not germane to the title of the act. It is contended the proceedings had under the provisions of this act are not simply irregular, but are invalid and void. The act in question was passed in 1893 (Act No. 204, Pub. Acts 1893), and amended in 1895 (Act No. 5, Pub. Acts 1895). Prior to the enactment of this law, and ever since 1887, Wayne county had a board of jury commissioners. After the act of 1893 became a law, a board of jury commissioners has been acting for the county of Wayne under the provisions of the later act. This board has selected the lists from which the petit jurors have been drawn, as well as the grand jury. The first 10 pleas interposed by counsel for respondent were overruled by Judge Lillibridge, he passing upon them upon their merits. In his written opinion he makes this statement:

"I have discussed the several pleas upon the merits, and found that they should be overruled; but, in my opinion, there is another, and more insuperable, objection to all of them, except those made to the qualifications of jurors. I have carefully examined the exhaustive brief submitted by respondent's counsel, but I am not convinced. To my mind, it seems very clear that the word 'challenge,' in sections 9496, 9497, 2 How. Stat., is used in the broad sense of 'objection,' and that the statute was intended to cover objections or challenges, whether raised by challenge before indictment or by a plea in abatement afterwards. There seems to me to be great force in the reasoning of Justice MORSE in *People v. Lauder*, 82 Mich., particularly at pages 134, 135. The discussion of this subject, also, in *Thomp. & M. Jur.* §§ 527-538, convinces me that the purpose of these sections was to prohibit technical objections to the array or persons of grand jurors, except for the cause allowed, whether raised by challenge or by plea in abatement. Every reason of public interest which could be urged against allowing objections to the array or persons of grand jurors by challenge exists with greater force to the allowance of such objection when raised by a plea in abatement. So far as the circuit courts of this State are concerned, it seems to me the language of Mr. Justice MORSE, above referred to, must control, until there is a decision more directly in point."

We do not deem it necessary to add to what was said by Judge Lillibridge, and by Justice MORSE in *People v. Lauder*, *supra*, except to cite the cases of *State v. Noyes*, 87 Wis. 340 (41 Am. St. Rep. 45), *People v. Smith*, 118 Mich. 73, and the recent case of *People v. Reigel*, 120 Mich. 78. In the last-named case Justice HOOKER calls attention to the provisions of the statute, and discusses the question at length. The cases sustain the ruling of Judge Lillibridge.

The eleventh plea in abatement alleges, among other things, which is the substance of the plea, "that the said indictment was found and presented by a grand jury composed of less than 23 persons, to wit," etc. Judges Lillibridge, Hosmer, and Carpenter, sitting *en banc*, passed upon this plea, and jointly signed a written opinion, which is in part as follows:

“On the trial of the issues of fact raised by the eleventh plea, as amended, to the indictment, we find it is true, as alleged in said plea, that only 21 persons were sworn on the panel from which the grand jury that found the indictment was chosen. More than that number, to wit, 23 persons, were drawn and summoned, but several were excused for various causes until the number finally sworn and impaneled was only 21. We are of the opinion, however, that this does not invalidate the indictment. We do not construe the provisions of the Wayne county jury act (Pub. Acts 1887, Act No. 95, § 23) as modifying the general statutes of the State in regard to the number of persons required to be sworn in this county to constitute a legal grand jury. There seems to be no doubt that under the general statutes (2 How. Stat. §§ 7562, 9494) a grand jury may be lawfully impaneled, and may act, consisting of any number of persons more than 15 and less than 24. *People v. Lauder*, 82 Mich. 132. In our opinion, therefore, judgment should be rendered for the people notwithstanding the above finding.”

This ruling is fully justified by the case cited by the learned judges.

For the purpose of expediting the hearing of the first 11 pleas, the assistant prosecuting attorney signed a stipulation as to what testimony was taken before the grand jury. This stipulation was made the basis of the twelfth and thirteenth pleas in abatement, which allege, in substance, that there was not sufficient testimony submitted to the grand jury to authorize them to find an indictment. To the above pleas in abatement an issue of fact was joined. The circuit judges were of the opinion that whatever knowledge the prosecuting attorney had of the proceedings in the grand-jury room he must have obtained either from the jurors or from his attendance in his official capacity, and that, as public policy did not allow him to divulge his knowledge, the stipulation could not be used. In this connection the language of Chief Justice CHAMPLIN in *People v. Lauder*, 82 Mich. 121, is very suggestive:

“We do not find it necessary to determine whether the grounds set up and relied on to quash the writ can prop-

erly be raised by plea in abatement, or whether they should not be raised by motion to quash. If issues of fact had been joined upon the pleas, we suggest that very serious obstacles lie in the way of trying such issues. Grand jurors cannot, in general, be questioned as to what took place among or before them while acting as such. The only exceptions existing are made by 2 How. Stat. § 9502. That section permits members of the grand jury to testify upon the trial in two instances: One, where a witness upon the trial has testified before them, they may testify whether the testimony of the witness examined before them is consistent with or different from the evidence given by such witness before the court; and in the other they may be required to disclose the testimony given before them by any person upon complaint against such person for perjury, or upon his trial for such offense. 'Where the statute prescribes the cases in which a grand juror may testify, it is held that he may do so in no other.' 9 Am. & Eng. Enc. Law, p. 17, and cases cited to note 1, p. 18. But neither of these contingencies has arisen in this case. Lauder has not been offered as a witness upon his trial, and cannot be unless he voluntarily presents himself as such; and then he would waive his privilege, and would stand upon the same footing as any other witness. Neither has a complaint been made against him for perjury. So upon the trial of this plea no juryman could be permitted to testify against or for him. Such testimony is not permitted on grounds of public policy. The same immunity extends to the clerk of the grand jury and the prosecuting officer, if present at their deliberations. 2 Best, Ev. § 579; 1 Tayl. Ev. § 863; 1 Greenl. Ev. § 252. The statute further declares that in no case can a member of the grand jury be obliged or allowed to testify or declare in what manner he or any other member voted on any question before them, or what opinions were expressed by any juror in relation to any such question. The same principle of public policy would not permit a witness who was present in the grand-jury room to testify in any case where a grand juror could not testify. How, then, could it be proved that Lauder gave testimony material to the case upon which the jury found the indictment, or how could it be proved that the grand jury found the indictment upon his and the testimony of the other witnesses? The latter fact is quite beyond the knowledge of Lauder, if he could be deemed a competent witness, which I do not think he would be."

See, also, *People v. O'Neill*, 107 Mich. 556, 560, 561; *Thomp. & M. Jur.* § 707; *Stewart v. State*, 24 Ind. 142; *Creek v. State*, Id. 151; *Kingsbury v. State*, 37 Tex. Cr. App. 259; *State v. Fowler*, 52 Iowa, 103; *State v. Smith*, 74 Iowa, 584; *Jones v. State*, 81 Ala. 79; *Washington v. State*, 63 Ala. 189; *State v. Fasset*, 16 Conn. 457; *U. S. v. Brown*, 1 Sawy. 531; *U. S. v. Reed*, 2 Blatchf. 435.

1 Bish. Cr. Proc. (3d Ed.) § 864, lays down the following doctrine:

“Grand jurors are authorized to find an indictment on their personal knowledge, with no superadded testimony; and this they were ‘anciently in the habit of doing.’”

The same author says, at section 872:

“Indeed, the doctrine appears to be general that the court cannot inquire into the sufficiency of the proof, or the mode of examining the witnesses, to invalidate an indictment.”

It was not competent for the prosecuting attorney to disclose what occurred in the jury-room, and the court very properly refused to act upon the stipulation.

We now take up the assignments of error alleged to have occurred upon the trial before a jury. It is very strenuously urged here that the circuit judge ought to have directed a verdict in favor of the respondent because there was no competent evidence to sustain the charge made in the indictment. To properly dispose of this contention, it is necessary to give attention to the claims of the people and the respondent, respectively. On the part of the people it is alleged that the boilers had been officially inspected and approved; that it was permitted to carry 80 pounds of steam in them; that the firing was done by means of a spray of oil and a jet of steam. It is claimed that, upon the morning in question, the respondent, after starting his fire, went away from the boiler-room, and remained away so long that an enormous pressure of steam was generated in the boiler. It is urged that, for

five or ten minutes before the catastrophe occurred, a noise was heard in the boiler-room indicating the pressure upon the boilers was too great, and that, if the engineer had been present, this noise would have been a warning to him, so he might have taken the necessary precautions to avoid the danger. It is also claimed that the appearance of the boiler and of the wrecked building and machinery immediately after the accident indicates very clearly the explosion was caused by an enormous pressure of steam in the boilers. It is said that all these things, taken together, indicate the explosion was caused by the criminal negligence of the respondent in his allowing the boiler to remain unattended too long. Upon the part of the respondent it is claimed the boiler was allowed to carry 80 pounds of steam; was supplied with a safety-valve; that the arrangement for firing was so adjusted that the firing could be made almost automatic,—so that an absence such as that of the respondent upon the morning of the accident was not negligent. It was his claim that he had to look after the other machinery in the building, including the heating apparatus and the elevators, which required his absence from the engine-room at times. He urges that, a day or two before the explosion, there was a leak about the cast-iron manhole of the boiler, and to obviate the leak it was necessary to apply a wrench to the bolt which drew the plate into place, the probable effect of which was to weaken, or perhaps break, the cast-iron manhole's ring; that when the steam was generated in the boiler so as to subject it to some pressure, which might have been some less than the 80 pounds which the boiler was allowed to carry, a fracture and opening occurred at the manhole, which suddenly released the pressure upon the water in the boiler, when the latent heat stored in the water of the boiler converted, almost instantly, a large portion of the water into steam, when the explosion followed. He claims his absence from the boiler-room was not negligence, and did not cause the explosion. Very soon after the explosion occurred, experts were upon the ground, looking after the

interests of the people and various parties. Careful observations were made of the effect of the explosion, not only upon the building, but upon the boilers themselves. Prof. Cooley was one of these experts. He was called as a witness upon the part of the respondent, and testified :

“The rupture started in the manhole ring. The manhole ring gave way suddenly, and probably released the manhole plate, with which release the pressure of the boiler was suddenly reduced. With that sudden reduction of pressure there was a formation of steam throughout the mass of water in the boiler, which carried the water out through the manhole opening, and ruptured the seam the rest of the way. This all took place presumably within one or two seconds, or less. * * * The manhole ring was without doubt a weak point in the boiler; weaker than any other point; weaker than the horizontal seam, which, in a normal boiler, is the weakest part of the boiler. This manhole ring was subjected to pressure due to screwing up the manhole plate, making a joint between the manhole plate and the manhole ring, which pressure produced in the metal of the manhole ring stresses very considerable in amount, quite in excess of the stresses which would be placed in cast iron under even ordinary conditions; much greater than would be placed on cast iron when used as a manhole ring. * * * It gave way. It gave way suddenly, and all at once; and, having given way, the remainder of the sheath,—that is, the steel and the rear section of the boiler,—was not sufficiently strong to withstand the sudden generation of force in the boiler, and the seam was torn, or the sheath was torn, its entire length, opening up on the rear head and on the seam of the middle section,—opening up and turning down, as has been shown by the model.”

It was his opinion that such an absence as was shown upon this occasion was not negligence, and that, if the engineer had been in the engine-room, he could have done nothing to avoid the catastrophe. Testimony of other eminent experts was to the same effect, one of them expressing the opinion that, if Mr. Thompson had been in the engine-room, he would not have lived to be tried for manslaughter.

It is claimed this testimony is not contradicted by any competent evidence. It is true that, upon the cross-examination of the witnesses for the people, they did not show that technical knowledge of the laws which govern the conversion of water into steam under varying pressures, or of the various theories in relation to the cause of explosions, possessed by the witnesses for the respondent. These witnesses had, however, experience in the construction of boilers and in their management. They visited the place where the explosion occurred, and observed its results. They examined the boilers themselves, and it was their opinion the explosion was the result of a very high pressure of steam. We cannot say that this testimony, taken in connection with what the witnesses for the people testified Mr. Thompson did and failed to do, and with the results caused by the explosion itself, failed to make a case on the part of the people. The testimony raised an issue of fact, which it was the duty of the judge to submit to the jury.

In the progress of the trial, testimony was offered for the purpose of showing the respondent had been guilty of acts of negligence by absenting himself from the boiler-room upon other occasions prior to the morning of the explosion. Objection was made to this testimony, for the reason that: "Whatever Mr. Thompson did on previous days had nothing to do with the result upon this day. The question is what he did upon the 6th day of November, 1895. What he did or failed to do upon other days has nothing to do with this issue at all,"—when the following occurred:

"The Court: It seems to me, this question seeks to show a course of conduct on the part of the accused rather than an intent, and I am inclined to view the testimony as competent, and as tending to show that the bursting of the boiler was not accidental, but the result of negligence on the part of the accused. I confess I am somewhat in doubt about it.

"Mr. Robison: Boilers don't burst on account of the course of conduct.

“Mr. Kirchner: Does your honor hold, because Mr. Thompson was absent from the boiler on the 3d, 4th, 5th of November, that that would have any relation to the bursting of the boiler on the 6th of November?

“Mr. Frazer: It shows his recklessness.

“The Court: It tends to show a course of careless conduct. If he was negligent on the 4th, 5th, or 6th, it might tend to show he was on the 6th or 7th. It might be that is wrong, but that is my view of it. I will give you an exception.

“Mr. Kirchner: I will except not only to the admission of the testimony, but to the reason stated by the court in the hearing of the jury.”

Under this ruling a mass of testimony, covering a good many occasions, and extending over a long period of time, was introduced, tending to show that Mr. Thompson was absent from the boiler-room under such conditions that his absence was negligence, and that upon at least one occasion he had been warned that disastrous results would follow his conduct. The respondent gave his version of these absences, so far as he could recall them; his testimony tending to show that they were not of a negligent character, and that usually some one was left in charge of the boiler when he was away. The court was asked to charge, in relation to this testimony, as follows:

“For the purpose of determining whether the respondent is guilty of negligence, as charged in the indictment, you are not at liberty to consider whether, on days and times before the explosion, the respondent had been: (a) Negligent in the operation or care of his boiler in any manner; nor (b) whether he had been drinking rum; nor (c) whether, while the boiler was in operation, he ever stood in the alley for any reason; nor (d) whether, while the boiler was in operation, he ever stood on the front steps of the Journal Building; nor (e) whether he ever left the boiler in charge of others; nor (f) whether, while the boiler was in operation, he slept in the boiler-room; nor (g) whether he ever absented himself from the boiler during the noon hour.”

He declined to do so, and charged the jury as follows:

“There is one request, or a subdivision of one of the

requests, as to the weight or consideration that certain testimony should receive at the hands of the jury, viz., as to what Thompson did or did not do prior to the 6th day of November, 1895,—the day on which it is alleged the boiler exploded. The people were permitted to show what Thompson did or failed to do prior to that time. I will state to you that it was permitted for the purpose of showing the character of the man, and as to what he was accustomed to do, and as tending to show what he might have done upon this 6th day of November; but he is not charged with being negligent on any day but the 6th day of November, and it will matter not how negligent he may have been at other times. Unless you are satisfied from the evidence in this case, beyond a reasonable doubt, that he was negligent on the 6th day of November, and that, as a result of such negligence on his part, the boiler in question exploded, and the death of Michael Ward resulted therefrom, your verdict should be, 'Not guilty.' He is charged with manslaughter, for having caused the death of Michael Ward on the 6th day of November, and that the death resulted from the negligence of Thompson; and unless you find that beyond a reasonable doubt, as I say, your verdict should be, 'Not guilty.' But if all the evidence in this case satisfies you, beyond a reasonable doubt, that he was guilty of neglect on that day, and that negligence resulted in the death of Ward, then your verdict will be, 'Guilty.' You may follow the officer, gentlemen.

"*Mr. Hunt*: I think you misspoke yourself on that point about the other acts of negligence. In the *Seaman Case* the Supreme Court said it was for the purpose of determining whether this was willful and reckless.

"*The Court*: That is what I meant when I said 'the character of the man.'

"*Mr. Hunt*: No; that don't cover it, I don't think.

"*The Court*: I stated to you, gentlemen, the purpose of admitting that testimony was for the purpose of showing the character of the man. What I mean by that is, what was the conduct, and what was the customary and usual conduct, of the man in the operation of his boilers, as tending to show whether or not his negligence, if it was negligence, on the 6th day of November, was willful. That is what I mean. You may follow the officer."

It is very evident that, during nearly all of this long

trial, the judge and jury were under the impression that the negligence of Mr. Thompson on the 6th of November might be presumed if he was shown to be negligent upon prior occasions. It was not until just before the jury were sent out that they were told this testimony was competent only as bearing upon the question of whether the negligence of Mr. Thompson on the morning of the explosion was willful, and this statement was not so clearly made as to be likely to remove from the minds of the jury the wrong impression entertained by the trial judge and the jury up to that time.

Counsel for the people say, in relation to this feature of the case:

"In the case at bar it is not charged that Thompson 'did willfully kill and slay' Michael Ward; that would be murder; but that he did 'willfully * * * neglect to give vigilant and constant care and attention.' It is the willfulness of the negligence resulting in the death that is charged. In the case of *People v. Seaman*, 107 Mich. 348 (61 Am. St. Rep. 326), it was not charged that Seaman did willfully kill Emily Hall. That would have been murder. It was charged that he willfully did an unlawful act, which inadvertently resulted in causing a death. In the indictment at bar it is charged that Thompson willfully did an act,—absented himself from his boilers,—which act, under the facts and circumstances set forth, made it an unlawful act, which inadvertently resulted in causing a death. The two cases are analogous in principle. McGRATH, C. J., in delivering the opinion of the court in the *Seaman Case*, says, at page 357, 107 Mich.:

"Where it is necessary to show a particular intent in order to establish the offense charged, proof of previous acts of the same kind is admissible for the purpose of proving guilty knowledge or intent."

"It is unnecessary to cite all the cases analyzed by the court in the above opinion, which enforces the doctrine for which we contend. The above case is referred to with approval upon this point in *People v. Thacker*, 108 Mich. 652, at page 663; *People v. Macard*, 109 Mich. 623, at page 630; *People v. Abbott*, 116 Mich. 263, at page 270."

Even if the argument of counsel is correct, it is evident that the wrong done the respondent by the admission of this testimony, accompanied by the reason assigned by the judge for its admission, was not cured by the attempt of the judge to cure the wrong impression at nearly the close of his charge. But are the cases cited by counsel, and this case, analogous, either as to the facts or as to the principles of law governing them? There is no claim that respondent intended to bring about the death of Mr. Ward, or any one else. Nor is there any claim that he intended to explode the boilers. The respondent does not claim, nor does he introduce any evidence tending to show, that his absence from the boiler-room upon the morning in question was not intended by him. He gives his version of the condition of the boiler, and of the fire, and of the length of time he was absent, and insists that, under all the circumstances, his act was not negligence. The question would seem to resolve itself into this: Is it proper, for the purpose of proving one act of negligence, to show other acts of negligence upon prior occasions? The law applicable to such a condition is so well collated in the brief of counsel for respondent that we insert portions of his brief here:

"The authorities are uniform, in this State and elsewhere, that an act of negligence cannot be proven by, or inferred from, previous acts of negligence. *Grand Rapids, etc., R. Co. v. Huntley*, 38 Mich. 537 (31 Am. Rep. 321), was an action by a passenger to recover damages for a personal injury. To prove the carrier's negligence, plaintiff attempted to show a defective track. The court said:

"We are also of opinion that no defects in the track could be relied on to show negligence contributing to the accident, except those existing where the track was injured or displaced, and that testimony as to the condition of the road away from the scene of the injury was improper to make out a cause of action, and could only tend to raise false issues. The testimony should be confined to the time, as well as place, of the accident."

"*Michigan Cent. R. Co. v. Gilbert*, 46 Mich. 176: Gilbert was an engineer in charge of one of the railroad

company's trains. He was killed by a collision, caused by the alleged carelessness of one Colwell, who was the company's yardman at Jackson, where the injury occurred. To show that Colwell was incompetent and that the railroad company knew of his incompetency, plaintiff proved a special instance of Colwell's carelessness. The court, in speaking of this testimony, said:

"It was not claimed in support of such testimony, and certainly it could not well be, that it had any tendency to prove that he [Colwell] was negligent in fact on the night of the collision."

"In *Guggenheim v. Railway Co.*, 66 Mich. 150,—an action for causing the death of plaintiff's intestate by running him down at a railroad crossing,—it was urged in defense, among other things, that deceased, by his own negligence, contributed to his death. This court said:

"Nor had the injury anything to do with the habits of care or want of care of Manheimer [the deceased] in crossing at this point at other times. The inquiry was legitimately confined to the crossing at this particular time when his death occurred. It could not avail his administrator, in this action, how careful he had been in crossing at other times, if he was negligent on this occasion; nor could the liability of the defendant be lessened if it were negligent and Manheimer was not negligent, at the time of his death, by the fact that he had been careless in crossing the track at some other time."

"*McNally v. Colwell*, 91 Mich. 527 (30 Am. St. Rep. 494), was an action to recover the value of lumber destroyed by fire through the alleged negligence of defendant. The trial court submitted to the jury this question:

"Was the defendant negligent in knowingly employing an engineer and fireman in the mill who were incompetent to perform their duties by reason of their use of intoxicating liquors?"

"This court held that the question was improperly submitted. This court said:

"There was testimony tending to show that the engineer and fireman were in the habit of using intoxicating liquors, and were sometimes seen under the influence of such liquors; but such liquor habit or occasional intoxication was not shown to have had any bearing whatever upon the origin of the fire, or to have had anything to do towards preventing its extinction."

“*Williams v. Edmunds*, 75 Mich. 92: The plaintiff sought to recover damages for injury received as the result of the negligent driving of defendant's servant. There was evidence tending to show that the driver was drunk at the time of the accident. Held, in such a case, the general character of the servant for sobriety is not in issue, and cannot be shown, any more than his general character as a careful driver.

“*Boick v. Bissell*, 80 Mich. 260, was an action to recover damages to plaintiff, alleged to have been sustained through the negligent driving of defendant's servant. Held, that the reputation of the defendant's driver as a careful driver was not in issue, and not material.

“*Langworthy v. Township of Green*, 88 Mich. 207, was an action to recover damages sustained while driving over an alleged defective highway. A witness for defendant said he knew plaintiff, and knew about his habits of driving. Counsel then asked as to what he could say as to the plaintiff's manner and method of driving his horses. The trial court excluded the testimony. This court said:

“‘The court very properly excluded the testimony. The fact that plaintiff was generally a careful driver could not excuse negligent driving on this occasion, nor could the opinion of a witness as to his habits on other occasions be admitted to establish his negligence on this occasion.’

“*Hatt v. Nay*, 144 Mass. 186: Plaintiff, while in defendant's employ, was injured through the alleged negligence of defendant's foreman. The plaintiff desired to prove certain specific acts of carelessness on the part of the foreman, before the accident happened, while engaged on the same job. The court held the evidence had been properly excluded.

“‘Because a servant may have been guilty of negligence on certain specified occasions, it by no means follows that he was on the occasion in question, or that he might not ordinarily be a careful and skillful workman, and properly employed as such. The investigation of other individual acts of alleged carelessness on the foreman's part would necessarily have a tendency to confuse the case by collateral inquiries, to protract it indefinitely, if those inquiries were carefully made, and to mislead and distract a court or jury from the true issue’

"*Kennedy v. Spring*, 160 Mass. 203, was an action to recover for personal injuries sustained by the plaintiff, while in the defendant's employ, by falling from a staging upon the roof of a house. The staging had been erected for the purpose of building a chimney. The plaintiff offered to show that defendant's son, who built the staging, had previously built other staging that had fallen down, for the purpose of showing that the son was not a competent person to put up the staging. Held, that the evidence was not admissible for that purpose.

"*Christensen v. Union Trunk Line*, 6 Wash. 75, was an action to recover damages sustained by a collision with a street car. The court said:

" 'It is contended that the court erred in permitting the plaintiff to show that this particular motorman had run his car at a high rate of speed upon other occasions, and we think the court did err in so doing. It was a fact collateral and irrelevant to the issue, and one which the defendant could not be expected to be prepared to rebut without previous notice.'

"*T. & H. Pueblo Building Co. v. Klein*, 5 Colo. App. 348, was an action to recover damages for causing death. The deceased was, at the time of her death, only six years of age. She was killed in defendant's elevator, which it was alleged was improperly operated, and also improperly constructed. The deceased was accompanied by her brother, who was nine years of age. One of the witnesses for the plaintiff was asked the following question:

" 'You can state, from your observation in riding up in the elevator at the Central Block, how the elevator was generally started by that young man.'

"The question having been objected to, the trial court said:

" 'The court admits the evidence solely for the purpose of determining what can be done with the elevator, and how it can be operated; and the jury are specifically told that the proof of negligence, if it shall be shown that the elevator could be operated negligently and dangerously upon any other occasion, will not be evidence that it was on this occasion so operated.'

"Witness then testified that he noticed a very marked contrast between the boy that operated the elevator at the time of the accident and another boy who sometimes operated it; and that, almost as soon as the witness stepped in-

to the elevator, this boy seemed to be very careless, and for some reason started it at full speed. The witness then testified to several acts of negligence of the elevator boy on other occasions. The appellate court, in commenting upon the admission of this evidence, said :

“ ‘The testimony of Saunders was clearly inadmissible. The only negligence charged was that of the elevator boy on the occasion of the accident. No other negligence was in issue. If he was negligent then, it would have been no defense that he had always before been careful. If he was not negligent then, it was entirely immaterial how habitually or recklessly negligent he might have been prior to that time. The effect of the testimony upon the jury must have been unfavorable to the defendant.’ ”

See, also, *Little Rock, etc., R. Co. v. Harrell*, 58 Ark. 454; *Gulf, etc., R. Co. v. Ogg*, 8 Tex. Civ. App. 285; *Atlanta, etc., R. Co. v. Smith*, 94 Ga. 107; *East Tennessee, etc., R. Co. v. Kane*, 92 Ga. 187 (22 L. R. A. 315); *Louisville, etc., R. Co. v. Berry*, 88 Ky. 222 (21 Am. St. Rep. 329); *Adams v. Railway Co.*, 93 Iowa, 565; *Carr v. Railway Co.*, 163 Mass. 360; *Jagger v. Bank*, 53 Minn. 386; *Hall v. Rankin*, 87 Iowa, 261.

In *People v. Seaman, supra*, there is a full collation of the authorities showing when proof of another felony than the one charged in the indictment is admissible. The case at bar is not one of them, and we think all this testimony was improperly admitted. We think, however, it was competent, as bearing upon the question of his recklessness, to show that he had been warned that danger would follow his absence from the boiler-room.

The court received evidence of comparisons between the use of coal and oil as fuel under steam-boilers. It is difficult to see how this was pertinent testimony. Coal was not used under these boilers. How quickly steam could be made with coal would not afford much light upon the question of firing with oil. The testimony was inadmissible. *McCormick Harvesting-Machine Co. v. Cochran*, 64 Mich. 636.

Evidence was admitted of the results of experiments made to ascertain within what time a given pressure of

steam could be raised in a boiler by the use of oil as fuel. This is said to be error, for the reason that the conditions under which the experiments were made were dissimilar from those which existed under the boiler in question, and that the reception of the testimony was damaging; counsel citing *Yates v. People*, 32 N. Y. 509, *Hoyt v. Jeffers*, 30 Mich. 181, *Patrick v. Howard*, 47 Mich. 45, and many other cases. We have already intimated that it would be competent to show the effect of the use of oil as fuel as bearing upon the question of whether the absence of Mr. Thompson from the boiler-room was negligent. The record does not show that it was contended or argued that, because steam could, by the use of oil as fuel under one boiler, be raised in a given time, therefore it would have a like effect under the boiler which was in charge of Mr. Thompson. The results of the experiments were given as showing the qualifications of the witnesses who testified as to the probable effect of the firing of the boiler in question in the manner in which it was fired. It is contended by the counsel for the people as follows:

“In a case involving negligence, experiments are admissible to prove: (1) That from given conditions a certain result would follow; (2) that from given conditions an alleged result would not or need not follow; and (3) in support or in explanation of opinion evidence. If an experiment had been introduced for either one of the first two purposes, counsel for respondent would have been correct in demanding that the similarity of conditions must first have been shown, and the cases cited by counsel are in harmony with the weight of authority. When, however, a witness has given his opinion, the weight of authority is that he may also be permitted to testify as to the grounds of the opinion expressed, which includes evidence of experiments during the course of his investigation of the subject to which his testimony relates. See *Farmers & Merchants' Bank v. Young*, 36 Iowa, 47; *Dickenson v. Inhabitants of Fitchburg*, 13 Gray, 555; *Williams v. City of Taunton*, 125 Mass. 34; *McKay v. Lasher*, 121 N. Y. 477; *Collier v. Simpson*, 5 Car. & P. 73; *State v. Jones*, 41 Kan. 309.”

In 12 Am. & Eng. Enc. Law (2d Ed.), 409, there is a collation of the cases bearing upon this subject. At page 410 it is said:

“Evidence of experiments in support of opinion evidence is admissible, that the court and jury may perceive the force of the witness’ reasoning, the soundness or fallacy of his logic, and in such manner judge of his capacity to give an opinion on the subject, the correctness of his conclusions, and, consequently, the weight due the opinion expressed.

“It has been held that an expert who has testified to his opinion in a matter at issue, as ascertained by experiments, will not be permitted to state, in his examination in chief, the details of the experiments upon which his opinion was based, though it was said that, in order to test the accuracy of the witness, he might be interrogated upon the subject on cross-examination. But the general rule, with better reason, is that an expert witness may be permitted, in the first instance, to testify as to the experiments upon which his conclusion is founded. Indeed, it is not inconceivable that a witness might express an opinion, susceptible either of absolute demonstration by an experiment before the jury, or of satisfactory and conclusive support by testimony as to experiments elsewhere made, and yet, unless opposing counsel chose to cross-examine as to experiments, nothing but the bare unsupported opinion of the witness would get to the jury.”

We think the testimony was competent.

It is urged that the trial court erred in receiving testimony tending to show: (a) That persons other than Michael Ward had either been killed or injured by the explosion; (b) that the persons injured suffered, were taken to the hospital, and detained there for a long time. It was competent to show the effect of the explosion, and if, in doing so, it was shown that some persons were killed, and others injured, we do not think it can be said that this was error. *People v. Marble*, 38 Mich. 117; *People v. Foley*, 64 Mich. 148. We do not see, however, how the testimony about the taking of some of the injured to hospitals, and how long they were there, helped to determine whether Mr. Thompson was criminally negligent

or not. The results of the explosion were very disastrous, and were well calculated to create a feeling of horror, and arouse resentment against any person who might be thought to be responsible for it, and a feeling of great sympathy for those who suffered as a result of it. This testimony was likely to create prejudice against the respondent. Its admission was error.

It is said the court erred in his instructions to the jury as to the degree of care respondent should exercise in his care of the boilers. The court was requested to charge the jury as follows

“The fact of the explosion, and even the possibility of guarding against it, do not necessarily make out a case of culpable negligence. Very few acts in life are done with such care to prevent accidents as would have been possible. The law only requires of any one that degree of care and prudence which persons who are reasonably careful ordinarily observe. To require more would put everybody under restraints in the management of his business, and in his dealings with others, which would be more hurtful in the embarrassments they would cause than beneficial in the protection they could give against injuries.”

“Whether the absence of the respondent from his boiler at the time of the explosion was negligent depends upon circumstances. If you find that the respondent, from his past experience, from his knowledge of the boiler, and the flow of oil, and of the burner, had reason to believe, and in fact did believe, that it was consistent with safety to be absent from the boiler, as he was, at the time of the explosion, then he was not, in law, guilty of criminal negligence by reason of such absence.”

The judge did not give these requests, but gave a general charge as to what would be culpable negligence, which, in the main, was a correct statement of the law, but it did not instruct the jury upon the particular questions raised in these requests. The requests should have been given. It cannot be that an act done in good faith, based upon what experience has shown to be safe, is criminally negligent. *Schroeder v. Car Co.*, 56 Mich. 132; *Cheboygan Lumber Co. v. Delta Transportation*

Co., 100 Mich. 16; *Whalen v. Railroad Co.*, 114 Mich. 512.

We do not deem it necessary to refer to the other assignments of error. They are either not well taken, or are necessarily decided by what we have already said, or, if error, are of such a character they will not be likely to be repeated.

The conviction is set aside, and a new trial ordered.

The other Justices concurred.

JACKSON BRIDGE & IRON CO. v. LANCASHIRE INSURANCE CO.¹

APPEAL—ASSIGNMENTS OF ERROR—SUFFICIENCY.

Under Sup. Ct. Rule No. 11, providing that every assignment of error shall be special, and no judgment shall be reversed for any other error than such as shall be specially assigned, assignments that the court erred in directing a verdict for plaintiff and in not directing a verdict for defendant are too general to be considered.

Error to Jackson; Peck, J. Submitted November 14, 1899. Decided December 21, 1899.

Assumpsit by the Jackson Bridge & Iron Company against the Lancashire Insurance Company on a policy of insurance. From a judgment for plaintiff on verdict directed by the court, defendant brings error. Affirmed.

Thomas E. Barkworth (*Myron H. Beach*, of counsel), for appellant.

Wilson & Cobb, for appellee.

¹ Rehearing denied April 8, 1900.

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HOOKER, J. This cause is before us upon writ of error, the assignments of error being "(1) that the court erred in directing a verdict for the plaintiff; (2) that the court erred in not directing a verdict for the defendant." It is said that the assignments are not sufficiently specific, under Cir. Ct. Rule No. 47, and Sup. Ct. Rule No. 11.

In *Johnson v. Ballou*, 25 Mich. 460, it is said:

"The right to review rests, therefore, on the last paragraph in the third assignment of error, and it is that the judge erred 'in directing the said jury to find a verdict in favor of the defendant.' It is manifest that this assignment of error affords no light as to what specific objections are leveled at the ruling excepted to. It assumes that a fault is lurking somewhere in the record, which judicial scrutiny may discover, but it fails to indicate in any way either where or what the fault is. By recurring to the briefs, we are led to understand that the parties wish to elicit an opinion upon several topics, which, as already stated, are not before us in such shape as to render it prudent to examine them."

The court did not expressly state that the assignment was bad. On the contrary, it reversed the case.

In *Wheeler & Wilson Manfg. Co. v. Walker*, 41 Mich. 241, an assignment, in substance, that "judgment ought to have been rendered for the plaintiff," was said to be "too general to be noticed," and did not indicate any question possessing merit. In *Alberts v. Village of Vernon*, 96 Mich. 551, error was assigned on a refusal to direct a verdict for the defendant. The assignment was held bad. It did not show whether the question went to the merits, or was based upon some technical point. It afforded no information to the trial court concerning the real point relied on, and was therefore unfair to him. In *Hecock v. Van Dusen*, 96 Mich. 573, the assignment was that the court erred in rendering judgment for the defendants. It was held bad. In *McCammon v. Railroad Co.*, 103 Mich. 104, a verdict was directed in favor of the plaintiff, and error was assigned on this direction. The court held the assignment bad, but considered the case,

and affirmed it. The case of *Conely v. Dudley*, 111 Mich. 122, may seem exceptional, as the case was reversed upon the assignment that "the court erred in directing a verdict for the defendant." The case appears to be in a nutshell, no testimony being offered by the defense, and there was no possible uncertainty as to what was meant. In *Michigan Mut. Life Ins. Co. v. Mather*, 113 Mich. 357, the assignment was that the court erred in refusing to direct a verdict for the defendant. The question does not appear to have been raised, and the case was affirmed on other points. The decisions are uniform upon the question, unless the case of *Conely v. Dudley*, *supra*, should be thought to be inconsistent. It was looked upon as exceptional, and was not intended to change the rule, but, rather, as not being within the rule, because not within its reason; the only possible question being whether there was evidence requiring the submission of the case to the jury.

It is unnecessary to consider other questions. The judgment is affirmed.

The other Justices concurred.

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PRUDENTIAL INSURANCE CO. v. LIERSCH.¹

LIFE INSURANCE—ASSIGNMENT OF POLICY—RIGHT OF ASSIGNEE—INSURABLE INTEREST.

The assignment, with the consent of the insurance company, by insured, of a policy on his life, payable to his executors, administrators, or assigns, to one having no insurable interest, who thereafter paid the premiums on said policy, entitled the assignee to the proceeds of the policy on the death of the insured, there being no restrictions on insured's right to assign it in the policy or the by-laws of the company.

Appeal from Wayne; Frazer, J. Submitted November 14, 1899. Decided December 21, 1899.

Bill of interpleader by the Prudential Insurance Company of America against Gertrude P. Liersch and Garret Van Winkle, special administrator of the estate of Henry Michelsen, deceased, to determine title to the proceeds of an insurance policy. From a decree for defendant Liersch, defendant Van Winkle appeals. Affirmed.

Galloway & Graham, for appellant.

William E. Henze, for appellee.

LONG, J. This cause was heard in open court, and the following opinion filed in it by Judge Frazer:

"This is a bill of interpleader, in which the complainant, the Prudential Insurance Company, having paid certain moneys into court, asks to have a decree entered as to whether that money shall be paid to the defendant Gertrude P. Liersch, or to Garret Van Winkle, special administrator of Henry Michelsen's estate.

"The facts in this case, as I understand them, are: Henry Michelsen obtained from the Prudential Insurance Company an insurance policy for the sum of \$1,000 upon

¹ Rehearing denied April 8, 1900.

his own life, payable to his executors, administrators, or assigns. He paid the premiums upon the same for some years. The policy was obtained on the 6th day of April, 1891, and Michelsen paid the premiums until July 10, 1894, at which time he assigned, with the consent of the company, his interest in the policy, to the defendant Gertrude Liersch. At the time of said assignment, if the premiums had not been paid, the policy would have lapsed, and under the rules and regulations of the company, as shown by the testimony, would have been of no value whatever. On July 10th, or thereabouts, Henry Michelsen went to one Selling, the agent of the Prudential Insurance Company in Detroit, and told him that he was unable to keep up the payment of premiums, and that he desired to assign his policy to Gertrude P. Liersch, who had been his housekeeper and nurse, and wanted to ascertain from the agent of the company whether he could do so. The agent of the company informed him that he could, and then and there, through the instrumentality of the agent, an assignment was prepared, which was offered in evidence, assigning his interest in the policy to Gertrude P. Liersch, after which Gertrude P. Liersch paid the premiums that subsequently became due upon the policy for some time until the death of Henry Michelsen, and now she claims that, on account of said assignment and the payment of these premiums upon her part, she is entitled to receive the \$1,000, the amount of the policy, or whatever is due upon said policy.

“The Prudential Insurance Company, the complainant, manifests a willingness to make this payment of whatever is due upon the policy, but states that the administrator of Henry Michelsen, to wit, Garret Van Winkle, claims that the defendant Gertrude P. Liersch has no claim upon the money represented by the policy, for the reason that the company had no authority to assign the policy to her, that she had no insurable interest that could be taken out by her upon the life of Mr. Michelsen, that she was in no way related to him, and for the reason that she had sued the estate of Henry Michelsen, and recovered from it, for services which she had claimed to have rendered as nurse and housekeeper; and for the further reason that it is claimed that, at the time Henry Michelsen made this assignment, he was not of sound mind, and incapable in law, therefore, of making this assignment. As to this proposition, I find the fact to be that, while Henry Michel-

sen, soon after the assignment of the policy, became paralyzed, and incapable of doing business, still I am well satisfied from the testimony of Mr. Selling that, at the time the assignment was made, he was perfectly capable, mentally and otherwise, of making the assignment; and I find nothing in this contention of the defendant Van Winkle. I find, also, in my opinion of the law, that the insurance policy obtained by Henry Michelsen upon his own life was a valid policy, and that he had an insurable interest, and that, the policy being valid at the time it was taken out, it was strictly within the power, under the law, for Henry Michelsen to assign that policy to whomsoever he saw fit; and I therefore hold the assignment of the policy to be valid, and whatever is due upon said policy is due and owing to the defendant Gertrude P. Liersch, and the decree of this court may be entered accordingly."

We think the evidence establishes the fact that Michelsen was of sound mind when the assignment of the policy was made. There is no statute pointed out which prohibited the assignment to Mrs. Liersch, nor is there any restriction in the policy or the by-laws of the company which prohibited the assignment, and the company assented to it. Under such circumstances, Mr. Michelsen had the right to make the assignment. *New York Mut. Life Ins. Co. v. Armstrong*, 117 U. S. 591; *Olmsted v. Keyes*, 85 N. Y. 598; *Bursinger v. Bank of Watertown*, 67 Wis. 75 (58 Am. Rep. 848); *Ionia County Savings Bank v. McLean*, 84 Mich. 625.

The decree is affirmed, with costs.

The other Justices concurred.

In re VEDDERS' ESTATE.

1. WILLS—EXECUTOR AS RESIDUARY LEGATEE—STATUTORY BOND—PAYMENT OF DEBTS—PREFERENCES.

Though an executor, as the residuary legatee in the will, may give, in lieu of the ordinary bond, a bond conditioned only to pay the debts and legacies, under 8 Comp. Laws 1897, § 9312, his right of disposition of the property is subject to the authority of the probate court to compel the application of the property to the payment, ratably, of the decedent's debts, in case the executor fails to provide for them from other sources; therefore it is improper, where there is a deficiency of assets, for such an executor to mortgage the property, or to apply the proceeds of a sale thereof, in such manner as to work preferences among the creditors.

2. SAME—LICENSE TO MORTGAGE—VARIANCE.

Where it appeared on petition for confirmation of a mortgage given to a creditor of the estate by an executrix who was a residuary legatee, and had given bonds as such under 8 Comp. Laws 1897, § 9312, that, while the license to mortgage granted by the probate judge provided that the mortgage should be for a stated amount and be subject to all existing incumbrances, the land being already mortgaged by the executrix to another creditor, the mortgage as drawn was for a greater amount and omitted the provision as to incumbrances, the probate court properly held the variance material and refused to confirm the mortgage.

Certiorari to Kent; Grove, J. Submitted November 14, 1899. Decided December 21, 1899.

In the matter of the appeal of the Kent County Savings Bank from an order of the probate court denying a petition for the confirmation of a mortgage executed by Hettie Vidders, as executrix of the last will and testament of Herman A. Vidders, deceased. From an order of confirmation, the executrix brings *certiorari*. Reversed.

J. C. Post (Wanty & Knappen, of counsel), for appellant.

T. J. O'Brien and James H. Campbell, for appellee.

HOOKER, J. Hettie Vedders was appointed executrix of her husband's estate, and filed a residuary legatee's bond, under the statute (3 Comp. Laws 1897, § 9312), in the sum of \$5,000, on May 16, 1893. She took possession of the property, which consisted of real estate and personal property. She filed no inventory. Commissioners were appointed, who allowed claims to an amount exceeding \$18,000, and the executrix paid many of these, exhausting the personal property of the estate in so doing. She also carried out several contracts made by the testator relative to the sale of land. This was in obedience to orders made by the probate court. The following claims were not paid:

Kent County Savings Bank	\$3,247 89
James Vandersluis	1,632 21
Robinson estate	4,121 32

Upon the 15th day of April, 1895, Mrs. Vedders filed, in the probate court, a petition for a license to mortgage the lands of the estate, alleging that all of the personal property had been used in the payment of debts, that the unsecured claims allowed amounted to about \$5,500, besides contingent claims to the amount of \$1,800. The prayer was that she might be licensed to mortgage the lands of the estate for the payment of the outstanding claims, and to secure to the Kent County Savings Bank the payment of the contingent claims. The court granted the license upon the 13th day of May, 1895, and the usual bond was filed. The mortgage was made of the date of August 24, 1895, to the Kent County Savings Bank, for \$5,537.72. It did not conform to the provisions of the license. The license authorized a mortgage for \$5,500; the mortgage was for \$5,537.72. The license required interest payable annually; the mortgage provided for inter-

est payable semi-annually. The license required the mortgage to be for the term of three years from the date of the order, which was May 13, 1895; the mortgage was executed August 24, 1895, and ran three years from that date. The license required that it be made subject to all incumbrances, by way of mortgage or otherwise, existing at the time, to dower and homestead rights; this was omitted from the mortgage. The license required an immediate report after the execution and before the delivery of the mortgage. The mortgage was recorded August 26, 1895. It contained a provision that it should not be delivered, or become operative, until all of the proceedings under the license should be fully reported to said court, and be, by an order thereof, duly confirmed. The petition for *certiorari* states that the business of procuring the license, including the drafting and execution of the mortgage, was done by the attorneys for the bank, whose advice Mrs. Vidders accepted, and that no delivery of the mortgage was ever made as provided by the last clause. No report was made, or order of confirmation sought, until November 25, 1898, when she executed and filed a petition for an order of confirmation. She now denies that the last-mentioned petition was her petition, and alleges that it was prepared by the attorneys for the bank, who sent it to her for execution by the notary, who came to her with said petition, showed her a paper, and told her it was a report to the probate court of what she had done in the estate; that she did not know the contents, but was afterwards informed of its nature; that it had been filed, and an order for hearing made for the 23d of December. On December 20, 1898, she filed a petition in said court praying leave to withdraw the petition for confirmation, and that no hearing be had upon it. On January 28, 1899, the bank filed its petition for a confirmation of its mortgage, alleging the proceedings, and stating further that, at the time it took the mortgage, it advanced to the executrix \$1,200, to pay the Vandersluis claim, which was then paid, and that the remainder of the consideration of

the mortgage was the balance due upon its claims. It alleged that it was informed and believed that all other claims against the estate had been fully paid or satisfied, and that there remained only the sum of \$5,537.72. It objected to the withdrawal of the first petition, and prayed that a hearing be had, and order made thereon, and that the petition for withdrawal be canceled. It asked that an order of confirmation be made *nunc pro tunc* as of August 24, 1895. A hearing was had in probate court, and confirmation was denied. Upon appeal this order was reversed, and an order of confirmation was made. The case is before us on *certiorari*, brought by Mrs. Vedders.

At the hearing in the circuit court the testimony showed that on October 1, 1894, the claim of the Robinson estate was secured upon a part of the real estate by a mortgage given by Mrs. Vedders for \$2,783.67, and that mortgage was, at the time of the hearing, in process of foreclosure, Mrs. Vedders having permitted an order *pro confesso* to be entered. This appears to be undisputed. Counsel for the executrix contend that, by giving the residuary legatee's bond provided by the statute, she became vested with the title to the property, and liable personally for the debts; that the remedy of the creditors against the property of the estate was changed to one against the legatee, and that only, the payment of the claims being secured by the bond; or that, at all events, the estate is closed, and the probate jurisdiction is ended. If this were correct, it would follow that it would be beyond the power of the probate court to interfere with the property by ordering a sale, and the executrix might lawfully sell, mortgage, or otherwise dispose of the property. But it has been decided otherwise in the case of *Lafferty v. People's Savings Bank*, 76 Mich. 35, as counsel admit. We are asked to overrule that case, but we are of the opinion that it should not be done. That case indicates that a residuary legatee, by giving the bond referred to, is no less an executor than as though he had given the

usual executor's bond. The right upon his part to have claims passed upon by commissioners within a limited time, and the right of creditors to present claims to such a tribunal or the probate judge, is the same as in other cases. The lien of the creditors upon the property is the same, and the probate court has authority to compel its application to the payment of debts, if the executor does not provide for them from other sources. It may require a report, when necessary, and may make or refuse an order closing the estate.

The statute relieves such an executor from filing an inventory, and it is said in the *Lafferty Case* that, "as a consequence," he may sell both personal and real property without a license. If this be true, and a sale is fraudulent, the grantee in possession must yield to the creditor's lien, as in the *Lafferty Case*. Although an executor may sell property at will, it is none the less his duty to use the moneys received to pay all of the creditors, and not one or more to the exclusion of others. One who is a *bona fide* purchaser may presume that the money paid for the land will be used by the executor in a proper manner. Perhaps the same may be said of a mortgagee who loans money, if the law gives such executor the right to mortgage without the usual license. But what shall be said of a mortgagee who takes a mortgage upon the property, or a part of it, to secure his debt, thereby becoming a preferred creditor, to the possible or probable exclusion of other creditors? Is it not the duty of the executor to pay the debts ratably, if there is a deficiency of assets? and, should the bond—which the *Lafferty Case* holds to be cumulative security—be inadequate, would not the creditors be entitled to a similar distribution of the proceeds of such bond? Would not a creditor who should be fully paid be required to contribute to another for whom there was nothing, by reason of inadequacy of the fund and insufficiency of the bond? and would the latter be compelled to assume the expense and responsibility of compelling a proper distribution in another court before

he could ask it? The law should not put a premium upon obtaining such preferences.

The impression may have, and probably has, prevailed that a residuary legatee might, by being appointed executor, and upon giving the proper bond, make such disposition of lands as he should choose to make, and pay debts when and as he should prefer. This would be a natural inference from a line of cases cited in *Lafferty v. People's Savings Bank*. That case, however, by enforcing the creditor's lien, and determining that the bond is a cumulative security, implies that the proceeds of the property should be applied to the debts ratably, and it would seem to follow that no creditor should be preferred, either by payment from the property or its proceeds or by mortgage upon it. See, also, *Blackmore v. Kent Probate Judge*, 95 Mich. 448.

The briefs, as well as the record, indicate that there is a contest between the holders of the respective mortgages for priority. If the Robinson executors could be assured that their mortgage would be held valid, and a prior lien in favor of the Robinson estate, there would probably be no contest here; but this may, from their standpoint, be reasonably in doubt, and we have indicated an opinion that it is not such lien. On the other hand, the Kent County Savings Bank claim should not be preferred through the mortgage given to it. We cannot assume that it was the intention of the probate judge to prefer a claim. On the contrary, his order indicates that he did not so intend, because he required the mortgage to be made subject to all existing mortgages and incumbrances, which mortgage, so drawn, would, when accepted, estop the mortgagee from questioning the priority of the Robinson mortgage. The Kent County Savings Bank did not take such a mortgage, but one which appears to leave it at liberty to question the validity of the Robinson mortgage. This is a material variance from the order, and justified the probate court in his refusal to confirm the mortgage.

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It is unnecessary to discuss other questions. The order of the circuit court is reversed, and that of the probate court affirmed, with costs of all courts.

The other Justices concurred.

PITTSBURGH & CONNEAUT DOCK CO. v. DETROIT TRANSPORTATION CO.

122	445
141	*349

1. NEGLIGENCE—WHARVES—QUESTION FOR JURY.

In mooring defendant's steamer, the mooring line caught on and displaced a timber on plaintiff's dock, causing a hoisting machine to fall. Action was brought to recover damages for the injury done the machine. There was evidence that, when the line had been fastened to a pile on the dock, the captain of the steamer gave the signal to go ahead, after having asked a man on the dock to throw the line over the timber. The line failed to clear the timber, and the headway on the steamer caused the support to be pulled out before the line could be thrown off. *Held*, that the question of negligence on the part of the captain of the steamer was for the jury.

2. SAME—PREMISES—UNACCUSTOMED USE—CONTRIBUTORY NEGLIGENCE.

It appearing that the timber supporting the machine was sufficiently fastened for the purpose for which it was intended, plaintiff could not be charged with contributory negligence in failing to fasten it so securely that it would withstand an unusual strain, such as that to which it was subjected through defendant's negligence.

3. SAME—PRINCIPAL AND AGENT.

An accident happened from the manner in which the mooring line of defendant's steamer was handled on plaintiff's dock. The man handling the line was an employé of plaintiff, but performed the service in question at the request of the captain of defendant's steamer, such duty not being in the line of his regular employment. *Held*, that he was the agent of defendant, and his negligence must be imputed to it.

4. TRIAL—REQUESTS TO CHARGE.

The refusal of requested instructions proper to be given is not error where they are fully covered in the general charge.

Error to Wayne; Frazer, J. Submitted November 15, 1899. Decided December 21, 1899.

Case by the Pittsburgh & Conneaut Dock Company against the Detroit Transportation Company for negligently damaging plaintiff's machinery. From a judgment for plaintiff, defendant brings error. Affirmed.

Wells, Angell, Boynton & McMillan, for appellant.

Barbour & Rexford (Hoyt, Dustin & Kelley, of counsel), for appellee.

LONG, J. This suit was brought to recover for damage done to the hoisting apparatus on plaintiff's dock at Conneaut, Ohio, through the alleged negligence of defendant's servants in the way in which they brought the propeller Iron Age up to the dock in order to unload thereon the steamer's cargo of iron ore. The plaintiff owns a large ore dock extending several hundred feet along the west side of the Conneaut river, near its mouth. The river runs approximately north into Lake Erie. At its mouth are piers. On the morning of July 12, 1896, the steamer Iron Age approached the harbor. A tug came out of the harbor with orders as to the place where the steamer was to discharge her cargo. The tug took the steamer's line, and the two proceeded through the piers up the river to the point where plaintiff desired the steamer to tie up. A line was passed to the dock from the steamer, and put over a mooring pile on the dock. This pile was intended to be used for this purpose. As the steamer began to move forward after the line was so placed, the line came in contact with a timber on the dock, on which rested a support to a movable apparatus used for hoisting ore from vessels and conveying it back over the dock. The pressure of the line moved the timber

outward, and the front support or leg of the hoisting apparatus was displaced, and fell partly over the front of the dock. This timber was from 10 to 16 feet long. The rail on it was much longer, and extended over the next southerly timber as well. When the northerly timber was pulled out, the next one south, to which the rail was spiked, was also drawn somewhat out of place, and the machinery fell. The declaration charges negligence, in the first count, in allowing the mooring line to drop over the end of the timber and to be drawn against it; and, in the second count, in taking so little care in the management of the steamer that its line broke the machine.

On the day of the accident, the arrangement of the hoisting machinery was as follows: There were two Brown hoists or conveyers and one or two King hoists, besides several other hoisting machines of a different type, called "whirlies." The Brown machine had in front a pair of legs shaped like a capital A, called the "A frame." These legs rested and could be moved on the rails, which were spiked to the square timbers running for a long distance near to and parallel with the face of the dock. From the top of this frame a bridge led back across the dock to two supports or towers also resting on rails. By moving these front and rear supports, the whole apparatus could be moved up and down the dock from south to north and north to south. A bucket was let down into a vessel's hold from near the top of the A frame, raised to the bridge, and carried back along it to the place where it was desired to dump the ore upon a pile or into a car. The timbers beneath the rails were about 12 inches square. The witnesses for the plaintiff testified that all these timbers, except the northernmost one, which pulled out, were drift-bolted to the timbers of the dock; that is, heavy bolts were driven down through them into heavy timbers below. The one which pulled out was not so bolted, but was toe-nailed to the planks, as there were no timbers beneath to which it could be bolted. The defendant's witnesses testify, from their examination

and measurements made just after the accident, that the easterly side of the northerly end of the timber overhung the water, and was not supported by any plank beneath it. On the other hand, one of plaintiff's witnesses testifies that the timber came only to the edge of the planking. There is likewise some dispute as to the relative position of the mooring pile or snubbing-post and this timber. All agree that the timber was between the post and the face of the dock. Gillmore and Day, plaintiff's witnesses, say the northerly end of the timber was 6 or 8 feet farther north than the post. Defendant's witnesses say that the timber ended just about opposite the post.

1. At the close of the trial, counsel for defendant asked the court to charge the jury that there was no actionable negligence shown, and that, under the undisputed evidence, plaintiff was not entitled to recover. This was refused, and we think very properly. The accident happened in daylight, and it appears that the pile to which vessels might tie was sufficient for that purpose. The timber on the dock which the rope caught and pulled out, thereby letting this machinery fall, was not intended, and not understood to be intended, to tie vessels to. It was sufficient for the purposes for which it was used, to wit, to support the machinery placed upon it. There was evidence to go to the jury upon the question whether the defendant's servants were negligent in permitting the rope to catch under the timber and thus pulling it out. The master of the boat testified:

"After I got our boat stopped, this man came out to the front of the dock, and my mate asked him to take a line, * * * so he came out to the edge of the dock. My mate hove him a line, * * * and he put it over the pile. When he got it over the pile, I asked him if he would throw it over that timber. * * * He made an effort to do so, and at that time I had signaled our engineer to go ahead. * * * This man raised the bight of the line up to throw it over the timber. He did not get it over, and just at that time the vessel was taking up the

slack of the line. It just began to straighten it up. I saw it was coming against the timber, and I sang out to my mate to throw off the line, but before he could get it off it pulled the timber out."

It was a question for the determination of the jury, under the circumstances here shown, whether the captain of the vessel was negligent in giving the signal to go ahead before seeing that the line was properly raised above the timber. The court submitted that question to the jury under a very fair charge.

But it is contended by counsel for defendant that the plaintiff invited the use of this post, and left an insecurely fastened timber and the leg of this hoist in such position that a line from a steamer seeking to work up to the dock against a wind would almost certainly bear with some force on one or the other; that under such circumstances the plaintiff permitted the landing place to be unsafe, and so invited the defendant into a trap, and gave it no warning of the situation; that this was fault contributing to the injury. But it appears that the timber upon which the rope caught was not intended to be used for hitching vessels, and the captain of the vessel knew this, and apparently apprehended the danger when the rope caught. Defendant's servants were not invited to use it. It is not questioned but that the timber, whether toe-nailed or not, was fit and sufficient for the purposes for which it was intended, and the rule is settled that there can be no fault in a perfectly lawful and customary use of one's own premises. *Alpern v. Churchill*, 53 Mich. 607. The question is well illustrated in *Kinney v. Onsted*, 113 Mich. 96 (38 L. R. A. 665). It was there held that the proprietor of a grain elevator was not liable for injuries to a customer occasioned by the giving way of a railing about an elevator platform, even though he had knowledge of its defective condition, when the customer at the time of the accident was putting the railing to a use other than that for which it was intended by leaning against it for support. It was there said.

"But, before it could become a snare or a trap, it must be assumed that its apparent good condition was an invitation to make such a use of it as the plaintiff attempted. As we have seen, its presence was not an invitation to make that use of it."

2. The court was asked by counsel for defendant to instruct the jury:

"If you find that the timber upon which the front of the hoist rested was not fastened to the dock in a reasonably safe and secure way, and that, if it had been fastened in a reasonably safe and secure way, the damage to the hoist would not have happened, then, whoever handled the line, the plaintiff cannot recover.

"If you find the damage was the result of two causes, —one negligence in handling the line or the steamer, or both, and the other an improper and unsafe mode of fastening the timber to the dock,—then, under the circumstances of this case, the plaintiff cannot recover."

These requests were refused, and the court charged the jury:

"If you shall find that a man slid down that line from the boat, and put it over the spile, and there was negligence in this act, either by the management of the boat or by the man who put it over the spile, then whatever negligence resulted was the negligence of the defendant in this suit, because nobody but the agent of the defendant had anything to do with it, if you shall believe the man slid down the line."

These requests were properly refused. As we have said, the plaintiff was not guilty of contributory negligence in leaving the timber there in that condition. Neither was the court in error in the charge above quoted. It cannot be said that the man who slid down the rope, if he did slide down it, was not the agent of the defendant.

3. It is contended that the court was also in error in refusing the following request to charge:

"The burden of proof rests upon the plaintiff to show that the damage done was due wholly to the negligence of the defendant, and that it was itself guilty of no negligence contributing to the damage. Unless the evidence

convinces you of both of these, viz., that defendant's negligence produced the damage, and that negligence on the part of the plaintiff did not contribute to that damage, the plaintiff cannot recover."

This request was a proper one, and correctly states the law, but the court refused to give the requests on either side. We think the general charge, however, fully covers this request.

4. Defendant also tendered the following request, which was refused:

"If you find that the damage to the hoist was not caused by any negligence or mismanagement of the officers or crew of the steamer, either in the running of the steamer or the handling of the line, the plaintiff cannot recover, and your verdict must be for the defendant."

This request was substantially given in the general charge.

5. Defendant also requested the court to charge:

"If you find the damage was due to the way in which the line was handled on the dock, and that the person who handled it was not one of the crew of the steamer or an employé of the defendant, the plaintiff cannot recover."

This was refused, and the court charged the jury:

"If you shall believe that this man did not slide down the line, but that the man who took the line upon the dock was the watchman of the plaintiff company, in the discharge of his duty as such watchman, and that it was part of his duty to aid these boats in the landing,—to do what he could to contribute to their landing,—in the interest of his employer, then he would be, in that act, the agent of the plaintiff, and, if he was guilty of contributory negligence in this case, then the plaintiff cannot recover. * * * It is claimed by the plaintiff in regard to this matter that that was not a part of that man's duty, that he was not employed for that purpose, and that it was no part of his business to interfere with the landing of these boats, or that, if he was asked to do it, being asked to do it made him the agent of the defendant. I charge you that such is the law; that if this was no part of his duty, and he was asked to do it by the defendant, and did it at its

request, and acting for it, in that respect he was the agent of the defendant, the boat company, and his negligence could not be determined or decided by you as contributing to the result as being the agent of the plaintiff. But, as I said to you before, if he was acting in that capacity, and he did this as a matter of duty or employment, or part of his duty or employment, on the part of the plaintiff, then a mere request to ask him to take the line would not make him the agent of the boat company, the defendant in this case."

We think there was no error in refusing the request, nor in the charge as given. It appears that none of the plaintiff's employés were on the dock at that time, except a Mr. Lindsay; and the evidence is undisputed that it was no part of the duty of Mr. Lindsay to take the line, and in fact it was shown that he was not on duty for plaintiff at that time, and was there only as a spectator. The court might well, under the undisputed evidence, have instructed the jury that the person who took the line was for that purpose the agent of the defendant. The captain testified that, when the line was thrown out, he called to this man to take it and place it over the pile.

6. We are of the opinion, also, that there was no error in the charge upon the measure of damages.

The judgment must be affirmed.

The other Justices concurred.

PEOPLE, *ex rel.* ATTORNEY GENERAL, v. A. P. COOK CO.

TAXATION—PART-PAID SWAMP LANDS.

Upon the people's appeal, the decree of the circuit court, declaring invalid the taxes assessed for certain years against part-paid swamp lands, and sustaining the validity of the taxes assessed against them for other years, was affirmed.

Appeal from Ingham; Person, J. Submitted November 15, 1899. Decided December 21, 1899.

Bill by the people of the State of Michigan, on the relation of Adolphus A. Ellis, attorney general, against the A. P. Cook Company, Limited, to restrain the removal of timber from certain part-paid swamp lands delinquent for taxes. Defendant filed an answer in the nature of a cross-bill, denying the validity of the taxes, and praying that a patent be issued on the payment of such taxes as might be decreed valid. From the decree rendered, complainant appeals. Affirmed.

Horace M. Oren, Attorney General (*Birney Hoyt*, of counsel), for complainant.

Taggart, Knappen & Denison, for defendant.

LONG, J. This proceeding is by an injunction bill on behalf of the State to restrain the defendant from cutting and removing timber from about 200 acres of land in St. Joseph county. The bill was filed in the Ingham circuit court, in chancery. The lands were included among those transferred to the State as swamp lands by the act of Congress of 1850, and were patented to this State in 1854. In 1855 Addison P. Cook entered into a contract to purchase the lands from the State. This contract was evidenced by swamp-land certificates Nos. 1,575 and 1,576, and the land then became of the class designated as "Part-

Paid Swamp Lands." By the provisions of the statute then in force, and by the terms of the certificates of purchase, no time was fixed within which the remainder of the purchase price should be paid. There was no law in force at that time authorizing the taxation of the interest of the certificate holder in such lands, and it therefore was not subject to assessment. The first law which is supposed to authorize such taxation was passed in 1858. Commencing with the year 1860, the public authorities have attempted to impose taxes upon the premises in question. Such taxes have, with few exceptions, not been paid, but Mr. Cook, the purchaser, and the present defendant, which succeeded to his interest in 1888, have insisted that the premises were not properly taxed. The State has continually declined to issue a patent, for many years insisting that all accrued taxes should be paid as a condition of such issue, and later insisting that the patent, if issued, should contain a reservation of a lien to the State for all taxes which had been assessed. The defendant has been unwilling to accept the patent on such terms, and has not paid the remainder of the purchase price, although it has paid every year the accruing interest.

In 1893 the treasurer of the township where the land is situated filed a bill in chancery in the St. Joseph circuit court against this defendant and others, alleging that it was removing timber from the land, that the township had large claims against the defendant, that the removal of the timber would destroy its security, and asking for an injunction. Pursuant to an agreement, this bill was dismissed, and a similar one filed by the State in the circuit court for Ingham county, in chancery. To this bill the defendant answered, denying the right of the State to the relief sought, and claiming that the taxes were invalid as against the defendant. The defendant also embodied in its answer allegations in the nature of a cross-bill, and asked affirmative relief. It set up its right to receive the patent for these lands, its willingness to pay the remainder of the purchase price and any valid taxes which might

exist, the various reasons why the State had no right to insist upon the payment of these taxes, and asked a decree that, upon the payment of the remainder of the purchase price, the patent should issue; but, while denying the validity of any of the taxes as against it, the defendant offered to pay whatever taxes the court might decree to be valid. The case was heard upon proofs taken in open court, and it was decided that the greater part of the taxes assessed against the property was invalid, but that there was an equitable lien in favor of the State and against the defendant for certain portions of the taxes held to be valid, upon the payment of which, together with the principal and interest remaining unpaid upon the certificates of purchase, the defendant was entitled to receive patents pursuant thereto, and subject only to further liability for taxes legally assessed for the year 1896 and thereafter. From this decree the State has appealed. The defendant, although many of its positions were not sustained by the circuit court, has not appealed.

The decree below recites the findings of the learned circuit judge, and states what taxes are void, and the reason for such holding, and what taxes are held valid, and the reason therefor. It would be of no profit to the parties or to the public to set out here the various claims made by the State and by the defendant. It is sufficient to say that, from a careful examination of the record and the briefs of counsel, we are satisfied that the court below was not in error in the case, and also that the proper decree was entered.

The decree below must be affirmed.

The other Justices concurred.

NEDOW v. PORTER.

HIGHWAYS—PROCEEDINGS TO ESTABLISH—NOTICE.

Where land has been occupied and held adversely for 18 years by one claiming to be the owner, it is not necessary, in order to lay out a highway on such land, to serve the statutory notice on others claiming an interest therein.

Error to Leelanaw; Aldrich, J., presiding. Submitted November 15, 1899. Decided December 21, 1899.

Trespass *quare clausum* by Joseph Nedow against Frank J. Porter. From a judgment for defendant, plaintiff brings error. Affirmed.

J. J. Tweddle, for appellant.

C. L. Dayton, for appellee.

LONG, J. Defendant is highway commissioner, and is charged by the plaintiff with trespass in cutting and removing certain wire fences for the purpose of opening a highway which defendant, as commissioner, had previously laid out and established. The only question is whether the proceedings to lay out said highway were in accordance with the statute. It is contended by plaintiff (1) that the commissioner had no jurisdiction, because no notice was served upon Mr. and Mrs. Paulus, or Mr. Doty, a nonresident; (2) that the notice to nonresidents was insufficient, in that it did not name the persons to whom it was directed; (3) that there was no proper tender of damages to plaintiff. Defendant had verdict and judgment. Plaintiff brings error.

1. It was not necessary to serve notice upon Mr. and Mrs. Paulus or upon Mr. Doty. The land in which it is claimed they had an interest was occupied exclusively by Mr.

Nedow, the father of the plaintiff, and had been so occupied for more than 18 years prior to the time the highway was laid out. It was a strip of land 20 feet wide, and an orchard had been set out there years before, and the entire strip fenced in and occupied by Nedow, for the entire period, as a part of his farm; and he claimed to own it, and occupied it adversely to Paulus and his wife and Mr. Doty.

2. It therefore appears that no notice was necessary to Mr. Doty, as a nonresident. It is also conceded that the plaintiff had notice, appeared at the meeting, and made no such objection as to nonresidents as he now seeks to raise.

3. Defendant testified that he tendered the damages to the plaintiff, and the question was properly submitted to the jury.

We find no error in the case. Judgment must be affirmed.

The other Justices concurred.

FIRST NATIONAL BANK OF LAKE LINDEN *v.* CONDON.¹

FRAUDULENT CONVEYANCES—INADEQUATE CONSIDERATION—EVIDENCE.

A decree subjecting to an execution against a married man property conveyed by him to his wife, to the extent that the value of the property exceeded, in the opinion of the circuit judge, the consideration furnished by the wife, was reversed; the court being of opinion that the finding on which the decree was based, that the consideration was grossly inadequate, was not justified by the evidence.

Appeal from Houghton; Haire, J., presiding. Submitted November 16, 1899. Decided December 21, 1899.

¹ Rehearing denied April 24, 1900.

Bill by the First National Bank of Lake Linden and the First National Bank of Calumet against William Condon, Annie Condon, and others, in aid of execution. From a decree against defendants William and Annie Condon, the latter appeals. Reversed.

Chadbourne & Rees, for complainants.

Gray & Looney (*B. M. Thompson*, of counsel), for appellant.

HOOKER, J. The complainants were judgment creditors of William Condon, and filed the bill in this case in aid of several executions which had been levied on the lands involved herein, to set aside deeds of the land from said William Condon to several relatives. At the hearing in the circuit court the bill was dismissed as against all of the defendants except William Condon and his wife, Annie Condon, and she only has appealed.

William Condon was engaged in business in the village of Hancock previous to 1896, and became involved. At that time he was owner of considerable land and other property, most of it being incumbered. Among his creditors was his wife, whose claim is shown to have amounted to over \$10,000, and his daughter, whose claim was upwards of \$3,000. Among the lands held by Condon was an undivided four-sixths interest in the following, viz., the N. E. $\frac{1}{4}$ of the N. W. $\frac{1}{4}$, and the S. W. $\frac{1}{4}$ of the N. W. $\frac{1}{4}$, and a few acres in the N. E. corner of the S. E. $\frac{1}{4}$ of the N. W. $\frac{1}{4}$, of section 27, adjoining the village of Hancock on the west. The testimony was taken in open court, and shows that Mrs. Condon was apprised of her husband's failing circumstances, and urged him to pay or secure the amount that he owed to her and to the daughter, and he promised to do so, and upon August 16, 1896, he made the deeds attacked. We need not concern ourselves with the conveyance to the daughter. Mr. Condon testified that at the time he figured the interest upon his wife's claim, and found due her \$8,981.65 (though later

he found that it should have been \$10,672.14), and that he figured and estimated the value of the four-sixths interest in the lands mentioned, and found that to be \$6,558.34, which sum he inserted in the deed to his wife, as the consideration, and she accepted the deed. At that time the premises were not platted, being substantially unimproved. Immediately after the proofs were closed, the learned circuit judge said:

"Gentlemen, I may as well decide this case now as any other time. *First.* The court finds the indebtedness to Mrs. Condon was *bona fide*, and was something above \$6,500, and the indebtedness to Miss Condon was *bona fide*, and was something over \$3,000. It is admitted in the pleadings, and in the testimony of Mr. Condon, that he was insolvent at the time he made the conveyances in question in this case; and the only question that this court will have to decide is whether the consideration named in the deeds to Mrs. and Miss Condon, respectively, was inadequate,—grossly inadequate. If it was, for all above that amount the conveyance will be deemed to have been voluntary, and must go to the creditors. If it was an adequate consideration,—a fairly adequate consideration,—the conveyance will stand, and the bill will be dismissed."

This was followed by a short discussion of the facts, from which he concluded that the interest was deeded to the wife for half what it was worth, which sum he held to be a grossly inadequate consideration. The case seems to turn upon the value of the premises; for it appears to be conceded that Condon might lawfully prefer his wife's *bona fide* debt.

After deeding this property, Condon was given a power of attorney from his wife and daughter to sell it. In August, 1897, the N. E. 40 acres, and the fraction of the S. E. 40 acres, were platted, and the streets were graded at an expense of \$1,000 or upwards, and the lots went upon the market. But few lots were sold, as sales ceased in October, 1897, owing to this litigation; that being the time complainants' levy was made. Condon testified that he and Mr. Gray, his solicitor, made up the figures upon

the property. Some lots in West Hancock and First addition were conveyed to her. Of these, a number were subject to land contracts. He figured these on the basis of amount unpaid, and they amounted to \$762.50; others were not incumbered, and aggregated \$1,575,—making a total of \$2,337.50. He deducted two-sixths, which others owned, \$779.16; leaving the price \$1,558.34 fixed for four-sixths. He placed a value of \$5,000 on the four-sixths interest in the two 40-acre parcels, thus making the amount of the consideration mentioned in the deed. Emery testified that he went over the ground a day or two before the trial, in August, 1898, at the request of counsel for complainants, and fixed the value of the unplatted land in 1896 at \$250 per acre. This was upon the theory that the land was valuable for platting. Upon cross-examination, he said that he was not positive that it could have been sold in 1896 for any such sum as that, but that it was his opinion that it was worth that for platting purposes. He said that he thought that had it then been sold at sheriff's sale, in August, 1896, it would not have brought much, but that it would, in his opinion, have brought more than \$7,500; and added, "The times and conditions in August, 1896, were not as bright as they are now." George Roulisson testified that he accompanied Emery for the purpose of estimating the value, and said, in substance, that they agreed upon Emery's estimate. A. J. Scott was supervisor of Hancock township in 1896, in which the land lies. He placed the value of the N. E. $\frac{1}{4}$ at \$2,000, and the S. W. $\frac{1}{4}$ between \$3,000 and \$4,000. William H. Roberts testified that the N. E. $\frac{1}{4}$ was worth not over \$60 an acre in 1896, and the S. W. $\frac{1}{4}$ \$75 or \$80 an acre. He had experience in platting and trying to sell lots upon an adjoining parcel, in 1896, upon which he based his opinion. It appears in the record that, in 1892, Joseph H. Chandler and the executrix of Charles E. Holland each sold an undivided sixth of all of this property for \$500, and it was shown that the land did not increase in value much from 1892 to 1896.

Thus, we have the testimony of Condon, Scott, and

Roberts, who testify that the value was \$7,500 or below, added to the fact of actual sales a few years before on a basis of \$3,000, against the testimony of Emery and Roulisson, who examined the land a day or two before the trial, and who state that in 1896 it might not have been possible to find a purchaser for any such price as they estimate the land to be worth. The circuit judge seems to have attached much importance to a letter written by Condon to Mr. John E. Jones, cashier of one of the complainants, on September 27, 1897. It is as follows:

“HANCOCK, MICHIGAN, September 27, 1897.

“MR. JOHN E. JONES, Cashier,

“Lake Linden, Michigan.

“*Dear Sir:* You hold two notes made by me, amounting to about \$10,000; also one note of my son's for about \$700, indorsed by me; also note or notes aggregating about \$—, made by O. W. Robinson and indorsed by me; also a note made by W. B. Northrup, on which there is a balance due of about \$3,063, indorsed by me and others, which has been paid by new notes of W. B. Northrup and James A. Close, Jr. I also understand that you suppose something to be due from me to Mr. James A. Close, as trustee in certain stock matters. You hold an insurance policy on my life for \$10,000 as collateral security for certain of the above obligations, on which there is now a cash surrender value of about \$1,200, as stated by you, and an ultimate endowment value of about \$12,500. I make you the following proposition in settlement of all the above obligations, and all claims or demands of every kind held by you against me, viz.: There has recently been platted and recorded by my wife and daughters certain territory in the outskirts of the village of West Hancock, known as ‘Condon's Second Addition to the Village of West Hancock.’ My wife and daughters have expressed a willingness to aid me to some extent in my financial troubles, and I think will consent to convey to you, in full settlement of my obligations above stated and referred to, blocks numbered 16 and 21 of said addition, comprising 46 lots. The inside lots (38) are now selling at \$200 each, and the corner lots (8) at \$300 each. The town is growing rapidly out towards these lots, and no doubt in time you will realize out of the same

your claim against me with interest. This proposition is on the condition that you surrender back to me all your claim and interest in said policy of insurance. Awaiting your reply, I remain,

“Very truly yours,
“WM. CONDON.”

To our minds, this is not very conclusive evidence. Soon afterwards a levy was made upon these lands. It is significant that the complainants took no steps to attach the property at or about the time the transfer was made. After times got better, and the village became prosperous, and the land had been platted and streets graded, it was easy to see that it was possible to get more money out of the land than Mrs. Condon paid for it. Then they levied, and filed this bill. We think the preponderance of the proof shows that it was not deeded to Mrs. Condon for a grossly inadequate sum, and that the bill should have been dismissed.

The decree is reversed and the bill dismissed, with costs of both courts.

The other Justices concurred.

PARSONS v. DETROIT & MACKINAC RAILWAY CO.

DEEDS—CANCELLATION—RAILROADS—RIGHT OF WAY.

A deed to a railroad company of right of way, absolute upon its face, will not be set aside, where neither fraud nor mistake as to its terms is shown, on account of the company's moving its depot to a point some distance from the land conveyed, though the grantor's belief that a depot would be maintained near by was the principal reason for his giving the deed.

Appeal from Bay; Maxwell, J. Submitted November 16, 1899. Decided December 21, 1899.

Bill by Edwin M. Parsons against the Detroit & Mackinac Railway Company to set aside a deed. From a decree for complainant, defendant appeals. Reversed.

Porter & Haffey, for complainant.

T. A. E. & J. C. Weadock, for defendant.

LONG, J. Complainant was the owner of the S. E. $\frac{1}{4}$ of the S. E. $\frac{1}{4}$ of section 35, township 16 N., range 4 E., Bay county, and other lands adjoining the same on the west, including portions of the plat of the village of Linwood. Defendant was constructing an extension of its railroad from Omer, Arenac county, to Bay City, Bay county, and in surveying its route had crossed the land above described. The road was not contributed to by the public or local subscribers, and the cost was paid entirely by the company. The matter of obtaining the right of way was in charge of D. J. Casey, chief engineer, and, when conveyances could not be procured, condemnation proceedings were had. Mr. Casey employed Messrs. Anderson and Cook to procure options on right of way, and they were instructed to get options wholly without conditions. On the 23d day of April, 1896, a meeting was held in the village of Linwood, attended by parties from whom it was desirable to procure options for right of way. At this time it was supposed the railroad would be constructed through the village, and options were being procured on that route. At this meeting the question was asked of Messrs. Cook and Anderson whether a depot would be constructed in the village of Linwood, to which an affirmative reply was given. Then some one asked the complainant whether the depot would remain after being erected, and he (the complainant) replied, "Of course it would." Messrs. Cook and Anderson did not agree to put such a provision in the option, but did state, as a matter of opinion, that, if the depot was erected in the village, it would not be moved; and the complainant states that he understood that such statement was made as a

matter of opinion. After this, and on the same day, a paper prepared by Mr. Cook was signed by the complainant. Neither of the routes for which the preliminary surveys had at that time been made was adopted by the defendant company. Its road did not run through the village of Linwood, but west of it.

When the option came to Mr. Casey's attention, he did not accept it. Complainant was then in the employ of the company, and Mr. Casey had a conversation with him, in which he explained that no deeds of right of way could be taken with conditions as to the erection and maintenance of depots; and Mr. Hewitt, who was in the employ of the company, prepared a deed, and sent it to complainant, who did not sign and return it promptly. In a conversation later with Mr. Hewitt, the complainant said it was not drawn in accordance with the option, and Hewitt told him he had instructions to take nothing but straight deeds without any conditions, and, if there was any question about it, he (complainant) would have to see Mr. Casey. Complainant retained the deed for a time, and on the 16th of October he was asked by letter to execute and deliver it. After that, and prior to the 2d day of November, 1896, which was the day the deed was recorded, the complainant brought it, as prepared by Mr. Hewitt, executed and acknowledged by himself under date of October 2d, and delivered the same to defendant by handing it to Mr. Hewitt. The deed covers the right of way occupied by the defendant company, and the center line of the road, as it goes north, crosses the east line of Mr. Parsons' land about 600 feet south of the north line thereof, and the amount of land taken is one and two-tenths acres, leaving a triangular piece, containing only four-tenths of an acre, belonging to complainant and east of the railroad; or, in other words, the land taken, and all of Parsons' land lying east of the right of way, would amount to one and six-tenths acres.

Mr. Casey testified that the deed was not prepared in reliance upon the option; that the option was never

accepted, and was not turned over to Mr. Hewitt; that complainant was doing all he could to get other lands; that he had a talk with him, and complainant was willing to give the right of way without conditions; that a depot was originally erected, and maintained from September, 1896, to July, 1897, at an expense of \$351.95; that the receipts of the office were \$314.46, or \$37.49 less than the expense of maintenance; and that the depot was moved a mile and seven-tenths to the south, to a point known as "Linwood Beach." There is a station one and a half miles north of the land in question, known as "Lengs-ville."

The testimony was taken in open court, and the court held that the deed was invalid, and required the defendant to go into the probate court with condemnation proceedings, and make a deposit of \$250.

The above facts are taken from the brief of counsel for appellant, and are fully sustained by the record. It is evident that the deed was made by complainant with the full understanding of its contents. This deed must control. There is no fraud or mistake claimed. Even if there had been a previous contract, containing the stipulation that a depot should be maintained in the village, such contract would not control the operation of the deed where no fraud or mistake in making the deed appears. *Clifton v. Iron Co.*, 74 Mich. 183 (16 Am. St. Rep. 621). But no such thing appears. There was no contract containing such stipulation which was ever approved by the defendant company.

The decree below must be reversed, and a decree entered here dismissing complainant's bill, with costs of both courts.

The other Justices concurred.

122 MICH.—30.

NELSON v. CRAWFORD.

1. ASSAULT—WHAT CONSTITUTES.

Where defendant dressed himself in woman's clothes, and went, in a spirit of fun, with no malicious motive or intent, to the residence of plaintiff, a neighbor, where he neither offered nor threatened violence, but merely followed plaintiff into her house, making no demonstration other than to tap the ground with a parasol, it was properly *held* that his conduct did not amount to an assault.

2. DAMAGES—INJURY BY FRIGHT.

Defendant, with no malicious motive or intent, dressed himself in woman's clothes, and went at dusk to the home of plaintiff, who became frightened at his appearance, and, six weeks later, sustained a miscarriage, which she attributed to the fright. *Held*, that the fright, unaccompanied, as it was, by any immediate physical injury, could not be made the basis of a recovery of damages for a result which could not have been contemplated by defendant.¹

Error to Cass; Smith, J. Submitted November 17, 1899. Decided December 21, 1899.

Case by Sarah Nelson against Robert Crawford for personal injuries. From a judgment for defendant on verdict directed by the court, plaintiff brings error. Affirmed.

Plaintiff and her husband reside on a farm about 40 rods from the residence of defendant. One evening defendant, dressed in woman's clothes, navy-blue bicycle skirt, light waist, sailor hat with flowers on it, and a thin, black face-veil, took a parasol, and went to her house. He had been a frequent visitor there, and was accustomed to play with her children. Although for many years he had been adjudged insane or incompetent, his malady was of a harm-

¹ For fright as basis for cause of action, see note to *Ewing v Railway Co.*, (Pa.) 14 L. R. A. 666.

less character, and it had never been considered necessary to restrain him. There is no testimony to show that he acted from malicious motives, or with any intent to do injury to plaintiff or any one. He said to others, shortly afterwards, "I did it to have a little fun; to see if they had any nerve." As he approached the back of the house, plaintiff stepped to the back door, and saw defendant standing three or four rods away. She spoke to him, but he made no reply,—only "mumbled." She testified that she was frightened, and ran into the house, and into her bedroom, where her husband was in bed; that she called to her husband to get up, telling him that "there is something here,—I don't know what it is;" that defendant followed her into the house, and to the bedroom door; that her husband took up a stick of wood, raised it, and told defendant to get out of the house; that defendant then gave his name; that she was made ill by fright; and that on October 22d, 42 days after the fright, she had a miscarriage, which she attributes to the fright. The only demonstration he made was by tapping the end of his parasol on the ground or floor. This suit is brought to recover damages resulting from the fright. The court directed a verdict for the defendant, on the ground that there was no assault or attempt to do her any bodily or physical injury, and that the law does not recognize fright alone, unaccompanied by any physical injury, as a basis for damages. ✓

John Wooster and John R. Carr, for appellant.

Charles E. Sweet, for appellee.

GRANT, C. J. (*after stating the facts*). We think the court properly held that no violence was offered or threatened, and therefore there was no assault. The second question is new in this State. The decisions are not harmonious, and cannot well be reconciled. The court, in directing the verdict, quoted the following language from the late case of *Mitchell v. Railway Co.*, 151 N. Y. 110 (34 L. R. A. 783, 56 Am. St. Rep. 605):

"If the right of recovery in this class of cases should be once established, it would naturally result in a flood of litigation in cases where the injury complained of may be easily feigned without detection, and where the damages must rest on mere conjecture or speculation. The difficulty which often exists in cases of alleged physical injuries, in determining whether they exist, * * * would not only be greatly increased, but a wide field would be opened for fictitious or speculative claims. To establish such a doctrine would be contrary to principles of public policy. * * * We think the most reliable and better-considered cases, as well as public policy, fully justify us in holding that the plaintiff cannot recover for injuries occasioned by fright, as there was no immediate personal injury."

The damages claimed in that case were of the same character as those here claimed. The immediate effect of the fright in that case was greater, as the plaintiff became unconscious by reason of the fright. The facts were that, while plaintiff was standing upon the cross-walk of a street, awaiting an opportunity to board one of the defendant's cars, and just as she was about to step upon it, the team attached to the car drew near, turned to the right, and came so close to her that, when they were stopped, she stood between the horses' heads.

Many of the cases are cited and commented on in the recent case of *Braun v. Craven*, 175 Ill. 401 (42 L. R. A. 199), in which it was held that no recovery for fright, without physical injury, is authorized by the common law or by statute. The facts of that case are much stronger for the plaintiff than are those in this case. The defendant was the landlord of plaintiff's sister; went to the house to collect rent; found the door ajar; opened it; walked upstairs; stepped inside the bedroom door; saw plaintiff sitting upon the floor; asked what she was doing, waived his arms, and, in a loud and apparently angry voice, said: "I forbid you moving. If you attempt to move, I will have a constable here in five minutes. I refuse to take possession of these premises." Plaintiff testified: "I was so frightened I was paralyzed with fear." Plaintiff recovered a large verdict. In its opinion the court says:

"These acts could not, in the ordinary course of things, have been reasonably anticipated to cause a diseased condition of appellee,—to create in her a seriously-diseased condition. Appellant might have reasonably anticipated that his acts would cause excitement, or even fright; but fright and excitement so seldom result in a practically incurable disease that, from the ordinary experience of mankind, such a result could not have been expected. The evidence for plaintiff was that, by reason of the excitement and fright, a condition of chorea, or St. Vitus' dance, was produced. This is shown to be a diseased physical condition resulting from mental suffering, superinduced by excitement and fright, unattended by injury to the person resulting from impact. Under the pleadings in this case, mere words and gestures are sought to be made actionable because of the nervous temperament of the plaintiff, without which such words and gestures would not be actionable. This would introduce and incorporate in the law a new element of damage,—a new cause of action,—by which a recovery might be had for an injury resulting to one of a peculiarly nervous temperament, while no injury would result to another in identically the same position. Of such a cause of action and liability for damage a dangerous use could be made. No such recovery is authorized under the common law, and no statute gives it."

In *Lynch v. Knight*, 9 H. L. Cas. 577, it was held that "mental pain or anxiety the law cannot value, and does not pretend to redress, when the unlawful act complained of causes that alone." A very valuable discussion of the right of recovery for mental pain and suffering alone is found in *Johnson v. Wells, Fargo & Co.*, 6 Nev. 224 (3 Am. Rep. 245). That was the first case upon the subject in that court, and the rule is so well and clearly stated that we quote the language:

"It is well to start from the ancient landmark, and to remember that all damage to be recovered in such cases is strictly compensatory; that while it may be possible to compensate bodily pain, and so much of mental suffering as may be indivisibly connected therewith (and this rather on authority than reason), yet that it is absolutely impossible to measure mental agony by money, and that no es-

established rule authoritatively commands such futile attempt; and consequently it must be held that so much of the instruction given herein as allowed the jury to consider the plaintiff's pain of mind, aside and distinct from his bodily suffering, was error."

Where the negligence was gross, it was held that no damages could be recovered by reason of peril and fright, because they are too remote. *Atchison, etc., R. Co. v. McGinnis*, 46 Kan. 109. Where plaintiff's horses became frightened through the negligence of the defendant, held, that he could not recover for mental suffering, vexation, and anxiety of mind, in the absence of averment and proof of physical injury. *Gulf, etc., R. Co. v. Trott*, 86 Tex. 412 (40 Am. St. Rep. 866).

These citations might be multiplied. They are sufficient to show the reasoning of the courts in support of the rule. Similar holdings were had in *West Chicago St. R. Co. v. Liebig*, 79 Ill. App. 567; *Wyman v. Leavitt*, 71 Me. 227 (36 Am. Rep. 303); *Spade v. Railroad Co.*, 168 Mass. 285 (38 L. R. A. 512, 60 Am. St. Rep. 393); *Ewing v. Railway Co.*, 147 Pa. St. 40 (14 L. R. A. 666, 30 Am. St. Rep. 709); *Victorian Railways Com'rs v. Coultas*, L. R. 13 App. Cas. 222. Some of the decisions above cited are careful to state that their opinions do not reach those cases where there was an intention to cause mental distress or to injure feelings. In some of the cases cited by the plaintiff in support of her theory, the decisions are based upon the violation of a legal right, where at least nominal damages are recoverable, as in a case of the mutilation of a dead body (*Larson v. Chase*, 47 Minn. 307 [14 L. R. A. 85, 28 Am. St. Rep. 370]); or the removal of a dead body from its place of burial (*Meagher v. Driscoll*, 99 Mass. 281 [96 Am. Dec. 759]); or the unlawful eviction of a tenant (*Fillebrown v. Hoar*, 124 Mass. 580). The two cases cited which most strongly support the plaintiff's contention are *Hill v. Kimball*, 76 Tex. 210 (7 L. R. A. 618), and *Purcell v. Railway Co.*, 134 (16 L. R. A. 203). In *Hill v. Kimball*, defendant assaulted two

negroes in front of the house occupied by the plaintiff and her husband as tenants, thereby frightening her, and causing a miscarriage. The court frankly stated that the case was a novel one, and they found no precedent for it. In *Purcell v. Railway Co.* the correctness of the rule is admitted, but the decision is based upon the fact that there was a physical injury resulting from the confusion, commotion, and excitement upon the car.

We think the clear weight of authority supports the instruction given by the court below. In this case there is no evidence that defendant intended any wrong, or contemplated, or can be held to have contemplated, the consequences alleged to have followed his acts. It was not dark. The time was between "daylight and dark." Plaintiff saw him when he was four rods from the house. Defendant was approaching plaintiff's house along the customary way. Under these circumstances and the authorities above cited, we think the instruction of the court was correct.

Judgment affirmed.

The other Justices concurred.



TOWNSHIP OF HAMTRAMCK *v.* RAPID RAILWAY CO.

1. STREET RAILWAYS—FRANCHISE—REVOCATION—TOWNSHIPS.

A right conferred upon a street-railway company, by resolution of a township board, to extend its line through the township to connect with another line, the connection to be made within a stated time after the completion of such other line, by which resolution it is provided that the "franchise" shall be void unless accepted in writing by the company,—when so accepted, constitutes a franchise, not subject to revocation.

2. SAME—DISREGARD OF CONDITIONS—FORFEITURE.

A willful disregard by the company of the conditions of its franchise with respect to the time within which the line should be built would entitle the township to maintain a bill to forfeit the franchise.

3. SAME—COMPLETION OF ROAD.

A street-railway franchise provided for the construction of the R. railway to connect with the D. railway, the connection to be made within two years after the "completion" of the D. railway. *Held*, that the term "completion" meant such a completion of the D. railway as would enable the heavy cars of the R. railway to pass safely over its tracks, and not merely such a completion as was sufficient to accommodate the lighter cars of the D. railway.

Appeal from Wayne; Adams, J., presiding. Submitted November 17, 1899. Decided December 21, 1899.

Bill by the township of Hamtramck against the Rapid Railway Company to enjoin the extension of defendant's tracks. From a decree dismissing the bill, complainant appeals. Affirmed.

Bacon & Palmer, for complainant.

Gray & Gray, for defendant.

LONG, J. It appears that the defendant company,

during the year 1894, constructed its road along Gratiot avenue, in the city of Detroit. On November 28, 1894, the complainant township granted a franchise to the defendant company to build and extend its line of road, connecting with the Gratiot-avenue line, westerly through the complainant township, along Harper avenue. It was provided, among other matters, in the franchise, that:

“Said railway, so far as the same extends easterly from the Gratiot road, shall be equipped and put in operation within one year of the completion of the line of said the Rapid Railway Company heretofore authorized to be built on Gratiot road; and so much thereof as extends westerly from said Gratiot road, whenever convenient for the purpose of connecting with any street-railway line built in the city of Detroit, the connection to be made within two years after the completion of the railway in the city of Detroit on Harper avenue.”

On September 14, 1898, the defendant began the construction of its road on Harper avenue westerly from Gratiot avenue under the above franchise. On September 16th the roadbed, for nearly two blocks, had been excavated, and the road was being rapidly pushed forward. On that day an injunction was issued by the Wayne circuit court in chancery, restraining the defendant from building its road; the complainant claiming by the bill that the defendant's rights had lapsed, owing to its failure to construct the road earlier. On a full hearing in the court below the injunction was dissolved, and the complainant's bill dismissed, with costs. The court filed an opinion in the case, which we think fully covers the case, and the facts therein recited are fully sustained by the record. The opinion is as follows:

“The bill of complaint in this case is an injunction bill for the purpose of restraining the defendant railway company from constructing a branch of its road along the north side of Harper avenue, in the city of Detroit, from Gratiot road westerly to St. Charles street, and to cancel, annul, or forfeit the right or franchise claimed by the railway company under which it proposed to construct such

branch. The bill of complaint was filed and suit commenced on the 16th day of September, 1898, and it is claimed by complainant that at that date the right of defendant to construct such branch had lapsed, and become forfeited or lost, for the reason that it had not constructed such branch within two years from and after the completion of the street railroad along Harper avenue from the west to the point of connection at St. Charles street.

"It appears from the evidence introduced in this case that the township board of the town of Hamtramck, acting under the authority of section 3548, 1 How. Stat., as amended by Act No. 12, Pub. Acts 1893, on the 28th day of November, 1894, adopted a resolution granting a right or franchise to the Rapid Railway Company, among other things, to construct a railway along the northerly side of Harper avenue westerly from the Gratiot road to St. Charles street, and to maintain the same during the corporate life of the company, upon certain conditions set forth in the resolution, only one of which—the first—is material to consider in this case. Leaving out the portion referring to the railway east of the Gratiot road, and quoting only that portion referring to the road in question, it reads as follows:

" 'And so much thereof as extends westerly from said Gratiot road [shall be equipped and put in operation] whenever convenient for the purpose of connecting with any street-railway line built in the city of Detroit, the connection to be made within two years after the completion of the railway in the city of Detroit on Harper avenue.'

"It is contended by complainant's counsel that this resolution does not create a franchise, but is only a license, subject to revocation. In connection with this contention, the fifth paragraph of the resolution may be referred to, which provides that:

" 'This franchise, and the permission hereby granted, shall cease and be utterly void unless said the Rapid Railway Company shall, within ninety days of the date hereof, accept the same in writing.'

"Such acceptance by the Rapid Railway Company appears to have been executed in writing on the 6th day of February, 1895, and its receipt by the township clerk was acknowledged on the same day.

"It will be noticed that in this fifth paragraph, and in the acceptance by the railway company, and in the ac-

knowledge by the clerk, the right granted is called and treated by the parties as a franchise. A franchise is defined to be 'a special privilege emanating from the government by a legislative or royal grant, and vested in an individual person or in a body politic or corporate.' And when accepted, and the terms agreed to by the person or corporation, it has frequently been held that a contract has been created. It seems to me that this right conferred upon the railway company, taken in connection with the acceptance, constituted what is known as a 'franchise,' and is not subject to revocation; and the doctrine that forfeitures are not favored, and that equity will not decree a forfeiture except for substantial reasons, applies to this case.

"I am of the opinion, however, that if the railway company had willfully, and without due regard to the rights of the township, disregarded the conditions of its franchise, and failed for two years after the completion of the Detroit Railway to make connection with it, as contemplated by the condition, this bill might be maintained and the franchise forfeited.

"This brings us to the question as to the meaning of the term 'completion,' and as to the facts developed by the testimony. On the part of complainant it is contended that the two years would begin to run from the time when the road was substantially completed so as to answer the purpose of its construction, and was put into use as a public conveyance for passengers, although many more things might be required to complete the road in the technical sense of that term. The evidence tends strongly to show that as early as July 4, 1896, the Detroit Railway commenced to carry passengers over its Harper-avenue line, and continued with more or less regularity to do so from that time on. It is not contended, however, that the road was fully completed until much later; the evidence tends to show not till November or December, 1896. Complainant's counsel refer to a number of cases¹ in support of their contention, and I am constrained to think that their contention is correct, and that only such completion would be required in law, under the condition quoted, as would render the road suitable for the use contemplated by the parties in making the contract. In the

¹ Viz.: *Tower v. Railroad Co.*, 34 Mich. 328; *O'Neal v. King*, 3 Jones, N. C. 517; *DeGraff v. Railroad Co.*, 23 Minn. 144; *Railroad v. Keene*, 62 N. H. 81; *Freeman v. Matlock*, 67 Ind. 99; *Fernald v. City of Boston*, 12 Cush. 574; *Russell v. Barry*, 115 Mass. 300.

cases cited by complainant's counsel, only the general use of the road as a public means of travel seems to have been contemplated. But in the present case it seems to me that something more was contemplated by the parties. It is evident to me, from the words of the resolution and from the proofs, that the words 'the connection to be made' mean the connection of the track of the Rapid Railway with the track of the Detroit Railway for the purpose of allowing the Rapid Railway cars to pass over the Detroit Railway track on the way to the central portion of Detroit. The proof tends to show that the Rapid Railway cars are much heavier and much longer than the Detroit Railway cars, consequently requiring a more solid and more even track. The proofs tend to show that along Harper avenue the track was not leveled up, nor ballasted, nor made safe for the Rapid Railway cars, till as late as November, 1896. In one case—if I remember right, as late as October—one of the Rapid Railway cars, in attempting to pass over the Harper-avenue track, had its fender or cow-catcher broken off because of the unevenness of the track. On the whole, I am of the opinion that the words 'two years after the completion of the railway in the city of Detroit on Harper avenue' should be construed to mean two years after the completion of such railway to the extent that the cars of the Rapid Railway might safely pass over its tracks. And, after carefully considering the evidence, I am of the opinion that the Detroit Railway on Harper avenue was not so far completed as to be safe for the Rapid Railway cars until as late as November, 1896; consequently, that this suit was prematurely brought, and that the defendant, having commenced the construction of its branch on the 14th day of September, was within its rights under the franchise quoted. The bill of complaint will therefore be dismissed, with costs to defendant."

We fully agree with Judge Adams in the views above expressed. The decree must be affirmed, with costs of both courts.

The other Justices concurred.

CHAMBERLAIN v. LAKE SHORE & MICHIGAN SOUTHERN
RAILWAY CO.

1. RAILROADS—RATE OF FARE—FRACTIONS.

Under 2 Comp. Laws 1897, § 8234, subd. 9, establishing a rate of fare of 3 cents per mile for certain railroads, a company may lawfully charge only 19 cents for carrying a passenger 6.48 miles; the fraction over being less than one-half cent.

2. SAME—EJECTION OF PASSENGER—WILLFUL WRONG—EVIDENCE.

In an action against a railroad company for ejecting a passenger from its train because of his refusal to pay a fare which had already been declared excessive in a suit brought by him against the company, and then pending on appeal,—the distance between the points being agreed upon, and the statute fixing the rate per mile which the company might lawfully charge,—it was not error to permit the records and files of the former suit to be introduced in evidence, they being proper to be considered by the jury, as bearing upon the willful nature of the wrong, in determining the damages to be awarded.

3. SAME—EXCESSIVE DAMAGES.

Where a passenger was wrongfully ejected from a train in the presence of 30 to 35 passengers, and was compelled to walk 5 miles, \$650 damages were not excessive.

4. TRIAL—MISCONDUCT OF COUNSEL.

Where plaintiff's right to recover was clear, and the only question related to the amount of damages, the court refused to reverse an award which was reasonable in amount, because of intemperate and ill-chosen remarks in the argument of plaintiff's counsel.

Error to Monroe; Kinne, J. Submitted November 17, 1899. Decided December 21, 1899.

Case by William Y. Chamberlain against the Lake Shore & Michigan Southern Railway Company for the wrongful ejection of plaintiff from defendant's train. From a judgment for plaintiff on verdict directed by the court, defendant brings error. Affirmed.

C. E. Weaver (*George C. Greene* and *O. G. Getzen-Danner*, of counsel), for appellant.

Willis Baldwin, for appellee.

LONG, J. October 28, 1895, plaintiff was ejected from defendant's train between Flat Rock and Trenton for refusing to pay a fare of 25 cents. He tendered 19 cents fare, which was refused, and defendant's conductor ejected him. He had been accustomed to travel over this line once a week or once in two weeks for a number of years, and had been compelled to pay 25 cents between these two points. The distance between these places is somewhat in dispute; the plaintiff claiming that it is only 6.3 miles, while defendant claims it to be 6.48 miles. On the trial, however, the time-table of the defendant was offered in evidence, from which it appears that the distance therein stated is 6.3 miles. It is admitted that the defendant company has no right to charge more than 3 cents per mile. In either view of the case, however, the defendant had no right to charge 25 cents. The utmost that could be charged, even upon the defendant's theory that the distance is 6.48 miles, would be 19 cents. Calling the distance that number of miles, at 3 cents per mile would be 19.44 cents. The fraction over the 19 cents is less than one-half of 1 cent. In *Zagelmeyer v. Railroad Co.*, 102 Mich. 214 (47 Am. St. Rep. 514), the statute fixing rates of railroad fare within this State (Act No. 202, Pub. Acts 1889; 3 How. Stat. § 3323, subd. 9) was under consideration, and it was said:

"This language would apparently not permit a charge for a fraction of a mile unless it was so large a fraction as to make the charge of 1 cent or more not in excess of 3 cents per mile. The statute formerly provided that the price of tickets might, for convenience in making change, be fixed at that multiple of 5 which was nearest the exact amount of fare; but the present statute (Act No. 202, Pub. Acts 1889) contains no such provision."

The plaintiff in the present case had judgment for \$650. Defendant brings error.

It appeared that in 1892 the defendant company had ejected the plaintiff because he had tendered 21 cents instead of 25 cents fare between these points, and that he brought an action based thereon. On that trial it was admitted that the distance was only 6.3 miles, and that distance only was shown by the time-table. In that case the plaintiff recovered a judgment for \$400. The case was removed to this court, and was here affirmed at the October term, 1896 (110 Mich. 614). That case had resulted in a judgment against defendant in the circuit court before the present case was brought. On the present trial the plaintiff offered in evidence the files and records in the former suit. This was objected to by defendant's counsel, but the court overruled the objection and admitted such files and records. This is claimed to be error. We think there was no error in this. It appears that the plaintiff had continued to pay 25 cents fare for several years prior to the former suit. In that suit it was admitted that the distance was only 6.3 miles; yet after that suit had gone to judgment, and the defendant and its officers knew by the ruling in that case that 19 cents fare was the utmost limit it could charge, it continued to demand from its passengers 25 cents fare between these points. The wrong to the plaintiff was aggravated by these facts. In *Welch v. Ware*, 32 Mich. 84, it was said:

“When the law gives an action for willful wrongs, it does it on the ground that the injured person ought to receive pecuniary amends from the wrong-doer. It assumes that every such wrong brings damage upon the sufferer, and that the principal damage is mental, and not physical. And it assumes further that this is actual, and not metaphysical, damage, and deserves compensation. When this is once recognized, it is just as clear that the willfulness and wickedness of the act must constitute an important element in the computation, for the plain reason that we all feel our indignation excited in direct proportion with the malice of the offender, and that the wrong is aggravated by it.”

See, also, *Warren v. Cole*, 15 Mich. 265; *Tefft v. Windsor*, 17 Mich. 486; *Brushaber v. Stegemann*, 22 Mich. 266; *Swift v. Applebone*, 23 Mich. 252; *Leonard v. Pope*, 27 Mich. 145.

Some claim is made that the damages are excessive. It appears that the plaintiff was ejected in the presence of 30 to 35 passengers, and was compelled to walk from that point to Trenton, a distance of about 5 miles. We think the circumstances of the ejection were such that the jury very properly gave him substantial damages. The court below properly guarded the rights of the defendant in this respect. He stated to the jury that "no damages can be allowed except such as have been established by the evidence in the case, and no damages should be allowed as a matter of punishment to the railroad company."

One other question is raised which we think proper to discuss. On the closing argument by counsel for plaintiff, he said, among other things:

"Little bits of outrages, perpetrated upon one man at a time,—a cent here, half a cent there. If a man pays 5 cents more than he ought in traveling a little piece of the road, and another man pays 10 cents more than he ought for freight, it amounts to a good deal in a year. It amounts to very little between Flat Rock and Trenton, says some one; but in 25 years how much would it amount to? The regular fare is 19 cents. They have taken 25 cents from Flat Rock to Trenton for 25 years. That amounts to \$5,470 that has gone into the pockets of the Lake Shore & Michigan Southern Railway Company between these two little points. Just imagine the work the farmers did along there to earn that amount. How many hours of hard work has it taken for these men to earn that? I call your attention to that because he called your attention to those things. I am calling it to your attention so that it can go into your mind and heart, and mine, and that of every man who has thought of the thing, that the little outrages from year to year gradually become all centered upon some one man, until he is so much outraged that he takes it into his hands and tries to correct the outrage against all the people. For 25 years, between Flat Rock and Trenton, the people had

been outraged to the extent, and had been stung, and this old man had been, he had felt it, not only by the outrage to himself, but to his neighbors. He felt the outrage that was going on, but he stood it a long time, as the other people had stood it; and why? Why, that the railroad company's lawyers— And, by the way, during the last year, according to the report of this old road— As people grow old, they ought not to have lawsuits. As railroads grow old, they ought not to have lawsuits, unless for such things as Mr. Weaver and his associates have had in cases like this. According to the report, there has been a large amount of expense for lawsuits, etc.,—\$63,024.45. That is taken from somebody. Every bit of it has been taken from the people of the State of Michigan, or other parts where this railroad goes; and still Mr. Weaver would laugh at you. Mr. Weaver would laugh at you and say: 'What do you care about it? You walk about your yard,—a great, big man.' It does not cost much to make a common, ordinary devil walk 5 or 6 miles; but if the president of your railroad, Mr. Vanderbilt, who said, 'The public be damned,' had been asked to walk 5 or 6 miles, would Mr. Weaver say it was worth only five, or six, or ten, or one hundred dollars? Why, it would mount into the millions. He would not want a man of that kind to be put off, and walk from Flat Rock to Trenton, for a few paltry dollars. But it is Mr. Chamberlain, an ordinary farmer, used to walking around the fields. I have walked around the fields, and I know it is no fun. Farmers do not have fun walking around the fields for earning their dollars."

While some of these remarks were made in answer to the arguments of counsel for defendant, yet many others of them were not, and counsel spoke of many things outside the record. This practice of counsel has many times been condemned by this court, and the language here is deserving of the severest censure. The court below should have interposed and stopped the intemperate speech. But we are not satisfied that any substantial injury was done the defendant. The amount of the verdict is not large, when we consider the aggravated circumstances under which the plaintiff was ejected; and we are not, therefore, inclined to reverse the case because of these intemperate

and ill-chosen remarks of counsel. The plaintiff was clearly entitled to recovery, and the only question was the amount of damages.

We find no substantial error in the case. The judgment must be affirmed.

The other Justices concurred.

CHAPELLE v. WEBSTER.

1. REPLEVIN—SERVICE—SUFFICIENCY OF COPY OF WRIT.

Under 3 Comp. Laws 1897, § 10659, requiring the officer to summon defendant in replevin by delivering to him a "certified copy" of the writ, service by delivery of a copy which omits the name of the justice in the place for his signature is irregular, and, on failure of plaintiff to remedy the defect, the proceedings should be dismissed.

2. SAME—ALIAS WRIT—PROCEDURE IN JUSTICE'S COURT.

Whether a justice of the peace is authorized to issue an *alias* writ of replevin for the sole purpose of remedying a defect in the service,—*quære*.

Error to Chippewa; Steere, J. Submitted November 17, 1899. Decided December 21, 1899.

Replevin by Louis Chapelle against William Webster. From a judgment for defendant, plaintiff brings error. Affirmed.

John A. Steinlein, for appellant.

John P. Conrick, for appellee.

HOOKEK, J. A writ of replevin issued by a justice of the peace was executed by seizing the property described therein, and serving upon the defendant a paper which,

but for the omission of the justice in the place for his signature, was a true copy of the writ. Upon the return day the defendant appeared specially, and moved that the proceedings be dismissed, and that damages be assessed in his favor, upon the ground that the justice did not acquire jurisdiction. The motion was based upon an affidavit of the defendant, to which was appended the defective copy. Upon the face of this copy the following certificate was indorsed:

"In Justice Court.

"Before Alexander Gurnoe, Justice of the Peace in and for Chippewa County.

"LOUIS CHAPELLE

vs.

WILLIAM WEBSTER.

"Writ of Replevin.

"I do hereby certify that the within is a true and correct copy of the original writ to me directed and delivered, and now in my hands for service.

"THOMAS E. DIXON, Constable.

"Filed May 22, 1899.

"ALEXANDER GURNOE,

"Justice of the Peace."

The motion was denied, and the defendant took no part in the subsequent proceedings before the justice. Judgment being rendered for the plaintiff, a special appeal was taken by the defendant to the circuit court, where the judgment of the justice was reversed, and the plaintiff has brought the case to this court by writ of error.

The service, not conforming to the statute (3 Comp. Laws 1897, § 10659), was irregular, and the justice should not have proceeded to try the cause, and render judgment, against the defendant's motion. Unless the plaintiff chose to remedy the defect, as suggested in *People v. Mecosta Circuit Judge*, 26 Mich. 414, and *Anderson v. Lenawee Circuit Judge*, 105 Mich. 90 (if such procedure was competent before a justice of the peace,—a question which has not arisen; but see Tiff. Justices' Guide [How. 5th Ed.], 105), the motion should have been granted.

Griffin v. McGavin, 117 Mich. 372. As no attempt was made to remedy the defect in the proceedings, the judgment was irregular, and the learned circuit judge had no alternative but to reverse it.

The judgment is affirmed.

The other Justices concurred.

PETERS v. YOUNGS.

TAX SALES—VALIDITY OF DECREE—RES JUDICATA—WRIT OF ASSISTANCE—COLLATERAL ATTACK.

Where, upon an application for a writ of assistance by the holder of a tax title, the owner appears, and questions the jurisdiction of the court to enter the decree of sale, an order overruling the objections so raised, and directing the issuance of the writ, is *res judicata* as to the validity of the decree, precluding the owner from afterwards attacking it in an action of ejectment, even though on different grounds.

Error to Marquette; Stone, J. Submitted October 28, 1899. Decided December 21, 1899.

Ejectment by Robert Peters against Clark W. Youngs and others. From a judgment for defendants on verdict directed by the court, plaintiff brings error. Affirmed.

Clark & Pearl, for appellant.

Hill & Smith, for appellees.

MONTGOMERY, J. This is an action of ejectment to recover possession of a lot in the city of Marquette, Mich., with store buildings thereon. Plaintiff showed a chain of title from the United States to himself. Defendant Youngs showed that he was a purchaser from the auditor

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126	112
122	484
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general under a sale made in pursuance of a decree of the circuit court for Marquette county, in chancery, and that he was put into possession by a writ of assistance.

It appears that an answer was put in to the application for a writ of assistance, alleging, among other things, that the decree was void for want of jurisdiction for certain reasons specifically set up in the answer. On the hearing the court overruled the answer, and granted the writ of assistance. On the trial of the present case the plaintiff contends again that there was no jurisdiction to render the decree, but assigns another and different reason for his contention than those assigned on the application for a writ of assistance. The circuit judge held that the order in the chancery suit, granting the writ of assistance, and determining that the court had jurisdiction, was *res judicata*. The appellant contends that the issue on the application for a writ of assistance was narrowed by the reasons which he put forth to establish the want of jurisdiction. We think, however, that the question as to the validity of the decree was necessarily involved in the determination of the application, and, having once submitted that question to a competent tribunal, the plaintiff cannot retry it on discovering additional grounds on which to attack the jurisdiction. *Rawiszer v. Hamilton*, 51 How. Prac. 297.

It is contended that the validity of the decree could not be litigated on the application for the writ of assistance, and for this reason the order in the chancery case is not conclusive. It is not accurate to say that the validity of the decree as affected by want of jurisdiction was not open in the proceedings. It is true that, the jurisdiction once established, the defendant would be precluded from retrying the merits on an application for a writ of assistance; but it was competent for the defendant to show want of jurisdiction, as was held in *Ball v. Ridge Copper Co.*, 118 Mich. 7. The plaintiff in this case did litigate the question of jurisdiction on the application for a writ of assistance, and we agree with the circuit judge that, what-

ever remedy he may have by bill of review, he cannot collaterally again attack that holding.

Judgment affirmed.

The other Justices concurred.

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81	886
183	421

TOWNSHIP OF SPRINGWELLS *v.* DETROIT, YPSILANTI &
ANN ARBOR RAILWAY CO.

STREET RAILWAYS—GRADING HIGHWAYS—FRANCHISE.

Under a street-railway franchise providing that the track should be laid on the north side of a country highway, and in such manner as to obstruct as little as possible the free passage of vehicles "along" the said highway, and that the portion of the roadway lying adjacent to the south rail of the track should be properly dressed to the track, in order that vehicles might easily cross, the company must continue the grading of the highway upon the track wherever it is within the 16-foot driveway used by vehicles, but, where it is wholly without such driveway, it need only grade to the south rail.

Certiorari to Wayne; Carpenter, Hosmer, Frazer, Lillibridge, and Waite, JJ. Submitted November 22, 1899. Decided December 21, 1899.

Mandamus by the township of Springwells to compel the Detroit, Ypsilanti & Ann Arbor Railway Company to comply with certain provisions of its franchise. From an order granting the writ in part, relator brings *certiorari* *i* Affirmed.

Hayes & Lawson (T. E. Tarsney, of counsel), for relator.

Cutcheon & Stellwagen, for respondent.

HOOKEE, J. The petition of the supervisor of Spring-

wells township, in the county of Wayne, was filed in the circuit court of that county, alleging that the township board granted to the defendant a franchise for the construction and operation of a street railway through such township, upon and along a certain toll road, known as the "Chicago Road;" that its railway is now in operation, but that its condition and operation are not in compliance with said franchise—*First*, because its rails are from 5 to 19 inches above the highway; *second*, it has not built crossings at farms and highways as prescribed; *third*, it is not ballasted between the ties, and by reason thereof teams cannot cross it; *fourth*, it runs its cars less frequently than the franchise prescribes. It prays a *mandamus* requiring the defendant to put its railway in such condition as the franchise prescribes, and operate it in accordance with the requirements. The defendant answered, admitting some of the allegations of the petition, and denying others. It states that the rails are raised a little above the roadbed, and that it is necessary to the successful operation of said road. It states further that the railway is built north of the center of the highway, and contiguous to the road ditch; that the highway slopes to the south edge of the railway. It denies that the highway is not dressed up to the south line of its railway. It claims that it should not be required to ballast between ties, for the reason that the track was not built within the traveled portion of the way, and was not designed to be used as a part of the highway, and that to so use it would be dangerous. Issues were joined and sent to a jury, which found against the defendant upon all material questions. Upon the hearing the court granted the writ, but refused to compel the defendant to lower its track to a level with the roadbed, and to fill between the rails, so that the whole of the roadbed or highway upon which the track is laid can be used by the public for the purpose of traveling thereon. The relator has brought the case to this court by *certiorari*.

Paragraph 2 of the franchise provides that:

“The track of said railway shall be laid to 4 ft. 8½ in. gauge, and so as to obstruct as little as possible the free passage of vehicles *along* the said highway. When the railway herein authorized to be constructed is built, that portion of the roadway lying adjacent to the south rail of the said track shall be properly dressed to the track, so as to provide for the easy crossing of the same by vehicles. This portion of the work herein authorized to be performed shall be done to the satisfaction of the highway commissioner of Springwells township and the township board of said township.”

Section 3 provides that, “so long as said highway shall remain unpaved, the tracks shall be laid on the north side of said highway.”

It is apparent that, if the defendant is to fill between the rails to the level of the top of the rails, it must be done by paving or planking, to accommodate the flanges of its car wheels. This was a country road. The learned judges held that, where the railway was within the 16-foot driveway, the defendant must continue the grading of the highway upon its track, but, where it was wholly without such driveway, it should continue it to the south rail of the track. We are of the opinion that this is all that it can be asked to do, under the proofs.

The order of the circuit court is affirmed.

The other Justices concurred.

CITY OF KALAMAZOO v. KALAMAZOO HEAT, LIGHT & POWER CO.

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f126	70
122	489
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APPEAL—DELAY—FAULT OF STENOGRAPHER.

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Delay in perfecting an appeal, due to the stenographer's failure to furnish in time a transcript of the testimony, is not ground for dismissing it, where it appears that the appellant acted with all diligence, procuring an order for an extension of the stenographer's notes immediately after the decree was rendered. *Harrison v. Van Buren Circuit Judge* (unreported), McGrath, Mand. Cas. No. 965, distinguished.

Bill by the city of Kalamazoo to enjoin the Kalamazoo Heat, Light & Power Company from occupying the city streets. From a decree for complainant, defendant appeals. On motion to strike from the files the case as settled, and to dismiss the appeal. Submitted December 2, 1899. Motion denied December 21, 1899.

Boudeman & Adams (N. H. Stewart, of counsel), for the motion.

William G. Howard and *E. A. & R. B. Crane*, contra.

PER CURIAM. The delay in settling the case was not due to any fault of appellant. The order for the extension of the stenographer's notes was given immediately after the decree, and at every stage the appellant appears to have used all reasonable diligence. The delay was owing to the default of an officer of the court, and is excused, under our former rulings. *Cameron v. Calkins*, 43 Mich. 191; *Gram v. Wasey*, 45 Mich. 223; *Lake Shore, etc., R. Co. v. Chambers*, 89 Mich. 5. See, also, *Waterman v. Bailey*, 111 Mich. 571.

The case of *Harrison v. Van Buren Circuit Judge*, McGrath, Mand. Cas. No. 965, relied on by appellee's

counsel, is not like this case, as it appears that no order for extension of notes was given in that case, which the stenographer was bound to act upon, until after more than four months had elapsed after the decree.

The case, as settled, should not be stricken from the files, nor should the case be dismissed, for the reasons stated in the motion.

Motion denied, with costs.

DAGES v. SANILAC CIRCUIT JUDGE.

REPLEVIN—QUASHING WRIT—MANDAMUS.

Mandamus will not lie to compel a circuit judge to vacate an order quashing, with costs, a writ of replevin, since the order is final, and reviewable on error.

Mandamus by John W. Dages and William H. Andrews, survivors, etc., to compel Watson Beach, circuit judge of Sanilac county, to vacate an order quashing a writ of replevin. Submitted December 12, 1899. Writ denied December 21, 1899.

James A. Muir, for relators.

William H. Aitkin and *John H. Farley*, for respondent.

PER CURIAM. This is an application for a *mandamus* to compel the circuit judge to vacate an order quashing a writ of replevin with costs. The order was a final one, and reviewable on error. The papers on which the order was based were matters of record. *Jewell v. Lamoreaux*, 30 Mich. 155; *Pingree v. Steere*, 68 Mich. 204. The case is unlike *People v. Bay Circuit Judge*, 41 Mich. 326. In that case the application was to vacate an order

quashing an attachment. The writ contained the usual summons clause, which defendant was still bound to answer, and the case was not dismissed. The order was not, therefore, final. In the present case the order was final, and reviewable on error. See *Olson v. Muskegon Circuit Judge*, 49 Mich. 85; *Orth v. Montcalm Circuit Judge*, McGrath, Mand. Cas. No. 717.

The writ will be denied on this ground.

ARBUCKLE-RYAN CO. v. CITY OF GRAND LEDGE.

122	491
152	682

MUNICIPAL CORPORATIONS—CONTRACTS—ULTRA VIRES—LIMIT OF TAXATION—BURDEN OF PROOF.

After the common council of a city had voted the entire amount of taxes which, under the charter, it might lawfully vote in a given year, it entered into a contract for the installation of an engine in the city electric-lighting plant, by the terms of which the city agreed to pay \$2,650 within 80 days after the engine should be accepted. After the engine had been accepted, and \$650 paid on the contract, the city refused to pay the balance, claiming that the contract was *ultra vires*, because in excess of the amount of indebtedness which the council was authorized to incur. The tax levy for the year included an item of \$1,400 for electric-lighting purposes. *Held*, that, in order to maintain the defense, it was incumbent upon the city to show that, at the date of the contract, there were not sufficient funds on hand, either in the lighting fund or the general fund, or both, which, added to the \$1,400 to be raised, would have enabled the city to meet the obligations imposed by the contract GRANT, C. J., dissenting.

Error to Eaton; Smith, J. Submitted April 5, 1899.
Decided December 30, 1899.

Assumpsit by the Arbuckle-Ryan Company against the city of Grand Ledge for goods sold and delivered.

From a judgment for plaintiff, defendant brings error.
Affirmed.

The city of Grand Ledge, through its proper officers, on the 23d day of June, 1896, in pursuance of a resolution unanimously adopted by the common council on the same day, entered into a contract with the Chase Construction Company, of Detroit, Mich., by the terms of which contract the construction company, in consideration of the sum of \$2,650 and certain used machinery, agreed to furnish one Russell engine, the same to be paid for within 30 days after it had been set, and tested and approved by the city electrician. The engine was furnished, was worth the contract price, and was accepted by the common council November 17, 1896. The city has paid on the contract \$650 in cash and the specified used machinery. After the engine had been accepted, further time for payment was asked and granted. The city thereupon gave an order to the company, said order being for the sum of \$2,000, with interest, and payable out of the electric fund. The construction company, December 16, 1896, assigned its interest in the contract and order to plaintiff, the Arbuckle-Ryan Company. The balance of the purchase money has not been paid, and was past due at the time suit was commenced. Defendant has the engine, has used it since acceptance, and has not tendered performance by payment, nor offered to return the engine. When the contract was made, the city had installed and was operating an electric-lighting plant, by means of which it lighted the streets and furnished lights to the inhabitants. It was necessary to secure a new engine for the further safe operation of this plant, and for more power.

By the charter of the city of Grand Ledge, the common council is limited to a tax of not to exceed 1 per cent. on the assessed value of all the real and personal property in the city made taxable by law. The city taxes of Grand Ledge are spread upon a roll which goes to the collector in July of each year. The estimates must be made in May, and

must be adopted by the common council at the first regular June meeting in each year. Before the contract in question was made, the taxes for 1896 had been voted and assessed at the sum of \$7,800 for the following purposes:

For outstanding indebtedness.....	\$5,000
“ interest on same.....	500
“ electric-lighting purposes.....	1,400
“ officers’ salaries.....	400
“ bridge fund.....	500

At the time the contract was made, the floating indebtedness was about \$4,000, \$3,000 of which was not due until May, 1897. The assessed valuation for Grand Ledge in 1895 was \$755,774; for 1896, \$772,065; for 1897, \$742,500. The amount of taxes levied in 1895 was \$3,000; in 1896, \$7,800; and in 1897, \$7,533. The amount yearly expended, including the interest account on the bonded and floating indebtedness, and not taking into account the expense or income of the water and electric-lighting plants, would be not far from \$3,000 for each of the years 1895, 1896, and 1897. When the order in suit was issued, December 15, 1896, the floating indebtedness had increased from about \$4,000 in the June preceding to about \$7,000, and no part of the \$4,000 had been paid out of the estimates made for taxation for the year 1896. At the time of the estimate in June, 1897, the city owed about \$7,000 floating indebtedness, of which \$3,000 did not become due until June 1, 1900, and \$2,000 until October 20, 1898.

This suit was brought to recover on the above order. Judgment for plaintiff for \$2,158.30 and costs.

Cassius Alexander (*S. L. Kilbourne*, of counsel), for appellant.

Clarke & Latting (*Russell C. Ostrander*, of counsel), for appellee.

GRANT, C. J. (*after stating the facts; dissenting*).

The contract which is the real basis of this suit is attacked as void because not within the power of the council to make. Counsel do not disagree as to the law. The following propositions are so well settled that the citation of authorities is unnecessary :

1. The agents of municipal corporations are limited to the power expressly conferred or necessarily implied.
2. Parties dealing with municipal corporations through their agents are conclusively presumed to know the law, and deal with them at their own risk.
3. When the charters of municipal corporations limit their agents to a certain rate of taxation, contracts in excess of that rate are void.

The question therefore becomes substantially one of fact, viz. : Did the estimates adopted by the common council prior to the making of this contract include it, or was there any money voted which could properly be used for that purpose? There is nothing on the record to show that at the time these estimates were made in May, and adopted in June, the purchase of this engine had even been suggested or contemplated. The amounts then adopted were up to the limit of taxation. The purposes for which the amounts were raised were well defined. The sole amount raised for electric-lighting purposes was \$1,400. All the rest was for outstanding indebtedness, interest on same, salaries, and bridge fund. Clearly, this amount was not included in the estimates, and no taxpayer or member of the council had anything before him to inform him that any such action was then contemplated. I think it impossible to reasonably reach any other conclusion than that the amount provided by this contract was in excess of the limit imposed by the charter for taxation. The result showed that this was so, because, when the contract was completed, there were no funds with which to pay, and an order was given, payable out of the electric fund. The common council had no power to take funds voted for one purpose and apply them to another. The charter provided the proper method for the council to

pursue, viz., to borrow the money for the purchase of the engine and boiler, provided the electors should authorize it. Act No. 322, Local Acts 1893, chap. 22, § 13. If plaintiff's assignor, at the time of entering into the contract, had taken the trouble to examine the records of the common council, it would have discovered the facts above set forth, and that there was no money on hand, and no provision for raising any funds, to meet this extraordinary expenditure. The action cannot be defended upon the ground that it was necessary for the safety of the workmen, or to supply the city with light. Common councils are not vested with authority to determine the necessity of expenditures which are beyond their power to incur. If they desire to exceed the limit, they must appeal to the electors under the charter.

This is not a case for the application of the doctrine of estoppel, in support of which counsel for plaintiff cite *Nelson v. Mayor, etc., of New York*, 63 N. Y. 535. In that case the materials furnished exceeded the limitation, and the court expressly held that contracts in excess thereof were void, but permitted a recovery upon the ground of a subsequent act of the legislature authorizing the transaction. Nor is it within the principle enunciated in *Coit v. City of Grand Rapids*, 115 Mich. 493, where it was held that "mere irregularities of action, not going to the essentials of the power, are not sufficient to defeat the exercise of the power." There was, in the present case, an absolute want of authority to enter into the contract, because the limitation of taxation had been reached. *Trump Manfg. Co. v. Village of Buchanan*, 116 Mich. 113.

The language of Justice Swayne, in *Railway Co. v. McCarthy*, 96 U. S. 267, that "the doctrine of *ultra vires*, when invoked for or against a corporation, should not be allowed to prevail where it would defeat the ends of justice," was not applied to municipal corporations, but to private corporations. The defendant railway company had agreed with the plaintiff in that suit to transport

cattle from East St. Louis to Philadelphia over other lines than its own, and the defense was that the contract was *ultra vires*. It is not surprising that that language was used, so entirely applicable to the defense in that case. But does it apply to a municipal corporation, which can exercise only the powers expressly or by necessary implication conferred upon it?

Are these limitations, placed by the people for their protection upon the powers of a municipal corporation, to be abrogated on the ground that the corporation has had the benefit of the contract, and therefore the people are estopped to assert its invalidity? Probably a large proportion of *ultra vires* contracts on the part of municipal corporations could be sustained if this rule were adopted. In the case of *Coit v. City of Grand Rapids, supra*, we said: "If we conceded the premises assumed by defendant, viz., that the contract was wholly *ultra vires*, we might be compelled to reach the conclusion that the city could not be estopped to set up its invalidity." The contract in that case was within the power of a municipality to make. Its action was merely irregular, and it is not necessary here to comment further upon it. When a certain limit of taxation is reached, the charter absolutely prohibits the making of contracts or incurring obligations beyond that limitation, and every such contract is wholly *ultra vires*. By no other holding can this wise provision of the law be given any effect. If the common council in this case could have made a contract for \$3,500, it could just as well have made one for \$35,000. The law absolutely enjoins the power when the limit is reached.

In *Wilkins v. Mayor, etc., of New York*, (Com. Pl.) 30 N. Y. Supp. 424, the city entered into a contract with the Staten Island Rapid-Transit Company under a lease of a certain ferry, by which the company agreed to make extensive and valuable improvements of a permanent character upon the wharf. These improvements had been authorized by a board of commissioners. The improvements were made. By the terms of the agreement, the

company was, upon certain conditions, to be reimbursed for these permanent improvements. It will be observed in that case that the improvements had been authorized by the proper municipal authorities, but the city had no authority to get the improvements made as was done under the terms of the lease with the ferry company. Strictly speaking, therefore, the contract was *ultra vires*, but the very thing to be done had been authorized. It was the method of doing, not the act, that was *ultra vires*. Many cases similar to this can be found, where the courts have applied the doctrine of estoppel to those contracts which are technically *ultra vires*, but which have been carried out, and of which the municipality has received full benefit. But do such cases apply to contracts and indebtedness incurred in direct violation of the charter of a municipality? It would be a dangerous doctrine to establish that a municipal common council could enter into contracts with those who are always anxious to sell their goods, and then estop the municipality from contesting the validity of the contract, on the ground that it has had the benefit of it. To say that the contract was within the apparent power of the council is not, in my judgment, correct. Have parties dealing with a municipal corporation the right to rely upon an apparent power in its agent, the common council, whose power is limited by the charter? What is an apparent power? Is it such as may be implied from a general agency? But do municipalities have general agents, who are presumed to be acting within the scope of their authority? Certainly not. It must follow that there is no apparent power upon which one may rely, but only the real, actual power, lodged in the municipality by the charter. Its charter is the sole guide, which all are held to know. To that alone parties must look and act at their peril. If the council refuses to tender back the property under such an illegal contract, the law provides a way for the party to regain possession of it. If he suffers some loss in so doing, he cannot complain,

because he should have made an examination into the authority of the council.

After writing the above, two rearguments were ordered on the following questions:

1. Was the amount of the order included in the tax budget of 1897?
2. If so, was this a valid ratification of the contract?
3. Does the record show that there was no money in the treasury when the contract was made which might have been appropriated in payment thereof?

The case was tried upon the theory that there was no money in the treasury out of which it could have been paid, and upon that theory was argued in this court. Counsel for plaintiff do not now contend that there was. There is nothing in the record to indicate that the amount was included in the budget of 1897. We need not, therefore, discuss the question of ratification. The burden of proof was upon plaintiff, and it has failed upon both of the above questions of fact.

Judgment should be reversed, and new trial ordered.

MONTGOMERY, J. I am for affirmance. The contract between the city and the Chase Construction Company was within the general powers of the common council. It was not, in its nature, *ultra vires*. If the condition of the city finances was such that the obligation arising out of the contract would exceed the amount which the common council was authorized to incur an obligation to expend, it was incumbent on the defendant to make that fact affirmatively to appear. It does not appear in the findings. It does not appear in the testimony. On the contrary, it does appear that \$1,400 was provided in the budget for the electric-lighting fund. This sum, it is true, was less than the sum required, but there is nothing to show that there were not sufficient funds on hand, either in the lighting or general fund, or both, to supplement this \$1,400, and meet the obligation. It does not appear that, if the Chase Construction Company had

investigated the condition of the treasury, it would have found no money on hand. The record is silent on this point. True, at a later date, when an order was issued, the electric-light fund had been depleted until it showed but \$362.54; but I discover no *data* in the record from which the condition of this fund on the 23d of June, 1896, can be determined. We should indulge in no presumptions of official wrong-doing in favor of a defense so unconscionable as that attempted in this case.

HOOKE and MOORE, JJ., concurred with MONTGOMERY, J. LONG, J., took no part in the decision.

FOX v. CITY OF BAY CITY.

MUNICIPAL CORPORATIONS — SEWER CONTRACT — SPECIFICATIONS — EXTRAS.

A city charter provided that, whenever the common council should order a public work, the board of public works should estimate the cost, and might cause surveys, plans, and specifications to be made, and report the same to the council, with such other recommendations as they might deem advisable. A sewer contract, entered into by authority of the council, provided that in case the amount of excavation or material should vary from the specifications, plans, or estimates, which were referred to in, and made a part of, the contract, the compensation to be paid the contractor should be increased or diminished *pro rata*. *Held*, that the estimates reported by the board were meant, and not those of the city surveyor, upon whose survey and estimate the report of the board was apparently based; and that the surveyor's estimate was no part of the contract.

Error to Bay; Maxwell, J. Submitted June 9, 1899.
Decided December 30, 1899.

Assumpsit by Henry Fox against the city of Bay City

to recover extra compensation under a sewer contract. From a judgment for plaintiff, defendant brings error. Reversed.

Brakie J. Orr and James E. Duffy, for appellant.

Simonson, Gillett & Courtright, for appellee.

MONTGOMERY, J. The plaintiff recovered a judgment against the defendant city in the sum of \$733.62 for extra compensation for services rendered in the construction of a sewer. The contract between the city and the plaintiff was in writing, and the case turns mainly on the construction of this contract. It is conceded by plaintiff's counsel that, unless the contract covered the extra work in question, there can be no recovery. The contract provided for the construction of a 26x39-inch egg-shaped sewer, with box outlet, in the center of Fourteenth street, "according to plans and specifications therefor on file at the office of the comptroller of said Bay City, which plans and specifications are hereby referred to and made a part of this contract," at an agreed price of \$5,959.32. The specifications offered in evidence by the plaintiff, under the head of "Detail of Material and Excavation for Main Sewer," have the following:

Total length.....	5,675 feet
Average depth of excavation.....	15 feet
Number cubic yards of excavation.....	—

Under the head of "General Specifications," a subdivision reads:

"*Depth of Cutting.* The approximate depth of cutting will be indicated upon the profile, a copy of which will be given the contractor upon application."

Under the head of "General Stipulations" are the two following, among others:

"(4) The board of public works reserve the right to alter or modify the designs, and to add to or diminish

from the contract price, and to be at liberty to make any alterations in the plan from construction, detail, or execution described by the drawings, estimates, and specifications, without invalidating or rendering void the contract; and, in case of any difference in expense, an addition to or abatement by the said contract amount, the same shall be made in ratio or proportion such work may have to the whole contract work agreed to be performed."

"(9) The work as it proceeds shall be estimated weekly by the board of public works. Only net measurement of the work will be allowed, notwithstanding any local or other usage or custom to the contrary: *Provided*, always, that 10 per cent. of each estimate will be retained by the city until full completion of the work. The final estimate will be made when the work shall have been completed, inspected, and accepted by said board of public works. In case the amount of excavation or material to be furnished shall be found to vary from the figures given in these specifications, plans, or estimates, such variation shall in no way vitiate the contract for said work, but in such case the compensation to be paid the contractor shall be increased or diminished, as the case may be, *pro rata*."

On the trial, a paper indorsed "Estimates of Surveyor 14th St. Sewer" was introduced. This paper is as follows:

"Estimated cost of furnishing material and constructing a 26x39-inch egg-shaped main brick sewer along the center line of Fourteenth street, commencing at the west line of Johnson street, and running thence west to the Saginaw river:

"Total distance, 5,675 feet. 5,475 ft. 26x39-inch brick sewer. 200 ft. 36x36-inch (inside measurement) box outlet.

"Average cut, 15 feet (approximate).

300,000 hard-burned brick, at \$6.00	\$1,800 00
Constructing 5,475 ft. brick sewer, at 20c.....	1,095 00
Cost of cement and sand, at 20c.....	1,095 00
60 10-inch slants, at 32c	19 20
34 6-inch slants, at 17c	5 78
200 feet box outlet, at \$1.00.....	200 00
9,500 cubic yards excavation, at 20c	1,900 00
	\$6,114 98

Manholes.

20 set castings for manholes, at \$6.00	\$120 00
Constructing 20 manholes, at \$10.00	200 00
500 cubic yards excavating, at 20c	100 00
Constructing lateral sewer and catch-basins with new sewer.....	100 00
	\$6,634 98
Superintending and survey.....	500 00
Total	\$7,134 98"

This paper was marked "Exhibit D," and will be so referred to hereafter.

Before the contract was entered into, the board of public works submitted to the common council of the city a report as follows:

"*Gentlemen:* We have caused a survey to be made, and have estimated the cost of furnishing materials for and constructing a 26x39-inch egg-shaped main brick sewer on center line of (14) Fourteenth street, commencing at west gutter line of Johnson street, and running thence west to the Saginaw river, and report as follows:

Total length of sewer.....	5,675 feet.
Average depth of excavation.....	15 feet.
Estimated cost of sewer, including all material and labor.....	\$6,634 98
Estimated cost of survey and superintending con- struction	500 00
Total estimated cost of sewer.....	\$7,134 98"

It appears by the testimony that the sewer was longer than described in the specifications. No question arises over this, as the city recognizes the justice of plaintiff's claim to extra compensation *pro rata*. The plaintiff also gave testimony tending to show that the excavation was greater than specified in two respects,—that the trench for the sewer was made deeper, and that in the line of the new sewer was an old sewer, which made it necessary to excavate a wider trench than would have been otherwise necessary. It was also testified by him that the work was

done under the direction of the city surveyor, and that additional compensation was promised him.

It is not contended by plaintiff's counsel that the promise of additional compensation is binding upon the city, nor could it well be so claimed, in view of our decisions. *McBrian v. City of Grand Rapids*, 56 Mich. 108; *Campau v. City of Detroit*, 106 Mich. 414. The plaintiff contends, however, that the estimate Exhibit D is a part of the contract; that the estimate of cubic yards of earth to be removed is to be taken as a part of the contract; that, under clause 9 of the specifications, plaintiff was entitled to charge for any excess in cubic yards; and that, while the city surveyor could not bind the city by a promise to pay, he could direct the work, and that if, in following the directions of the city surveyor, the estimate was exceeded, plaintiff is entitled to compensation.

In determining what estimates were referred to in clause 9 of these specifications, it is important to keep in mind the fact that the contract is authorized by the common council of the city, and that the necessity for this authority must have been known to the contractor. Section 50, Act No. 413, Local Acts 1889, provides:

"Whenever the council shall order the performance of such work, the board of public works shall proceed forthwith to estimate the cost of such work, and may cause surveys, plans, and specifications to be made, and report the same to the council, with such other recommendations as they may deem advisable."

Such a report of estimate was made to the council, but such estimate did not include any statement as to the width of excavation necessary. Assuming that the members of the common council were familiar with the provisions of the specifications, and knew of the reference to estimates in section 9, what estimates could have been intended except such as the council had official notice of? The only estimates which, under the charter, are to be submitted to the council, are estimates of the board of public works, and not estimates of the city surveyor. The board reported

to the council that Henry Fox offered to furnish the material for and construct the sewer according to the plans and specifications for a stated price. On inspection of the plans and specifications, the council saw a reference to estimates. The only estimates which the council was bound to or could take notice of were those reported. With this report and the report of the bid before it, the council authorized the contract. This authorization was essential to the validity of the contract. Act No. 413, Local Acts 1889, § 64. We are constrained to hold that the surveyor's estimates, Exhibit D, were not part of the contract as authorized by the council. Having reached this conclusion, the case is ruled by *McBrian v. City of Grand Rapids* and *Campau v. City of Detroit, supra*, and it becomes unnecessary to consider the other questions raised by appellant.

Judgment is reversed, and a new trial ordered.

The other Justices concurred.

PEOPLE v. WARREN.

122	504
128	214

122	504
81W	860
80ASR	582

122	504
e135	'632

122	504
153	'614
153	'617

1. CRIMINAL LAW — TRIAL BY JURY — PROVINCE OF COURT — DIRECTING VERDICT.

Where the jury in a criminal case showed themselves unwilling to render a verdict in accordance with an instruction that it was their duty, under the evidence, to find the respondent guilty, it was reversible error for the court to state to them that there was nothing for them to do but to comply with the direction of the court, and that they violated their oaths as jurors when they set up their individual opinions against the court's instructions.

2. SAME—EMBEZZLEMENT BY PUBLIC OFFICER—INTENT.

Under 3 How. Stat. § 9263a, making it a felony for any public officer knowingly and unlawfully to appropriate to his own use, or to the use of any other person, money received by him

in his official capacity, and section 9263c, providing that the failure of any such officer to pay over to his successor all moneys which should be in his hands as such officer shall be *prima facie* evidence of the offense, it is not necessary, to constitute the offense, that the unlawful appropriation should be with an intent to forever exclude the rightful owner from use and possession.

3. SAME—EVIDENCE—ADMISSIONS—CROSS-EXAMINATION.

Where, upon the trial of a public officer for the embezzlement of public funds, one of respondent's bondsmen, as a witness for the people, had testified to admissions made to him by respondent, and to payments made by the bondsmen, respondent should have been allowed to show, on cross-examination of the witness, the entire conversation with him, and the entire transaction about the payments.

Exceptions before judgment from superior court of Grand Rapids; Newnham, J. Submitted October 26, 1899. Decided December 30, 1899.

Frank D. Warren was convicted of embezzlement Reversed.

M. L. Dunham, H. M. Dunham, J. Kirwin, and H. J. Felker, for appellant.

Horace M. Oren, Attorney General, and *Frank A. Rodgers*, Prosecuting Attorney (*Rodgers, McDonald & Minor*, of counsel), for the people.

MOORE, J. The respondent was city clerk of Grand Rapids. He was charged with appropriating to his own use money belonging to the city. The case was tried before a jury. The trial judge charged the jury at length. Near the close of the charge he instructed the jury that it was their duty to return a verdict of guilty. The jury retired with an officer, and, after being out for three hours, they were brought into court, and the following occurred:

"*The Court*: Mr. Clerk, you may ask the jury if they have arrived at a verdict.

"*The Clerk*: Gentlemen of the jury, have you arrived

at your verdict? If so, let your foreman arise and answer.

"The Foreman (Mr. Goodell): We have not. You ask if we had come to a verdict?

"The Clerk: Yes; have you arrived at a verdict?

"The Foreman: We have not; no, sir.

"The Court: Gentlemen of the jury: You have been out now somewhere about the space of three hours. The court very plainly gave you his instructions, and told you what it was your duty to do. The court instructed you that it was your duty to render a verdict of guilty in this case. There was nothing else for you to do; there is nothing else for you to do; and any individual juror or jurors who sets himself up against the plain instruction of the court is violating the oath which he took when he was sworn upon the case. The responsibility, gentlemen, of finding this verdict, is not yours; you simply have to do as the court directs you to do; and, as I said, no individual juror or jurors must set up his own opinion against the instructions given you by the court, that, under the law and the undisputed facts in this case, it is your duty to render a verdict of guilty in this case."

The jury again retired, and, after being out 20 minutes, returned into court, when the following took place:

"The Court: Mr. Clerk, you may take the verdict.

"The Clerk: Gentlemen of the jury, have you agreed upon your verdict? If so, let your foreman arise and answer.

"The Foreman: We have.

"The Clerk: What say you, Mr. Foreman? Do you find the respondent guilty or not guilty?

"The Foreman: We find the respondent guilty, according to his honor's instructions.

"Mr. Dunham: I would like to have the jury polled."

The jury was polled. Four of the jurors replied in substance that, because of the instruction of the judge, they voted guilty. Afterwards a motion was made for a new trial, and an affidavit signed by 11 of the jurors was filed, stating in substance that each of them would have voted "Not guilty," had they not believed that in so doing they would have been guilty of contempt of court, and possibly subject to fine and imprisonment.

Leaving out the question of whether this affidavit can be considered or not, it is very clear that up to the last moment the jury did not acquiesce in the direction of the court to find a verdict, and that four of them, at least, were unwilling to acquiesce in said verdict. The practical effect of what was done was that not only did the trial judge direct the jury as to their duty, but, when the jury failed to follow his direction, he did for them what he claimed it was their duty to do. Many questions are involved in the case, but the important question is, Can a trial court compel a verdict of guilty in a felony case, when some of the jurors are not willing to render such a verdict? The claim of counsel for the people is stated as follows: "The trial judge has power to direct a verdict of guilty in a criminal case where the facts are admitted or undisputed, and the intent is a legal inference from the undisputed facts, or in cases where the statute does not make intent an element of the offense, but commands an act to be done or omitted which, in the absence of the statute, might have been done or omitted without any culpability, and where consequently the bare commission or omission of the act in question in itself constituted the offense, irrespective of any felonious intent on the part of the defendant. * * * We contend that directing a verdict in a civil case or a criminal case comes to the court by virtue of its being the sole judge of the law; that, where the facts are undisputed, there is nothing for the jury to pass upon, and it logically follows that if the court is the judge of the law, and the facts are undisputed, it is then a question for the court to answer which party should recover in a civil case, and what the verdict should be in a criminal case;" citing *Montee v. Com.*, 3 J. J. Marsh. 132; *Duffy v. People*, 26 N. Y. 588; *Sparf v. U. S.*, 156 U. S. 51; *State v. Burpee*, 65 Vt. 1 (19 L. R. A. 145, 36 Am. St. Rep. 775); *Hamilton v. People*, 29 Mich. 173; *People v. Mortimer*, 48 Mich. 37; *People v. Richmond*, 59 Mich. 570; *People v. Kirsch*, 67 Mich. 539; *People v. Neumann*, 85 Mich. 98; *People v. Repke*, 103 Mich. 459; *People v. Hawkins*, 106 Mich. 479; and other cases.

It, of course, is well settled that in civil cases, where the facts are undisputed and the case turns upon a question of law, the court can direct a verdict, and he can have the clerk take the verdict without having the jury retire for consultation. It is not true, however, that this has ever been allowed in a criminal case in this State. Our attention has been called to a good many cases where the court has directed a verdict in a criminal case, but it has not been called to any case where the jury failed to follow the instructions of the judge, and the judge himself pronounced the verdict. In a civil case the court may set aside a verdict, whether it be for the plaintiff or defendant. It may do the same thing in a criminal case in case of a conviction, but it cannot do so in case of an acquittal. It would be a useless form to take the verdict of a jury in a civil case involving only questions of law, where the verdict, whether for the plaintiff or defendant, might be set aside by the judge because contrary to the law; but the judge could not set aside a verdict of acquittal if rendered by a jury in a criminal case. Can he, by compelling a verdict of guilty, do indirectly what he could not do directly?

The right of trial by jury was denied to persons accused of crime in the early history of the race. It was not until after a long and persistent struggle that the right was secured. This right was deemed so essential that in the Constitution of the United States, by the sixth amendment, "the right to a speedy and public trial by an impartial jury of the State and district wherein the crime shall have been committed" is guaranteed. It has been held that this is a right which cannot be waived, and that a trial by the judge, even by the consent of the prisoner, is erroneous. *State v. Maine*, 27 Conn. 281. Article 6, § 28, of the Constitution of this State, also guarantees to the accused the right to a speedy and public trial by jury. This is a right which cannot be waived except by a plea of guilty. *Hill v. People*, 16 Mich. 351; *People v. Luby*, 56 Mich. 551; *People v. Murray*, 89 Mich. 284 (14 L. R.

A. 809, 28 Am. St. Rep. 294). In *People v. Marion*, 29 Mich. 31, it is said:

“It is one of the most essential features of the right of trial by jury at common law that no jury should be compelled to find any but a general verdict in criminal cases, and the removal of this safeguard would violate its design and destroy its spirit.”

This case is cited with approval in *People v. Harding*, 53 Mich. 56 (51 Am. Rep. 95).

I think it clear that a general verdict involves, not only a decision of the facts in the case, but an application of the law to the facts. In *Hamilton v. People*, 29 Mich. 189, this language is used:

“The circuit court was asked, but refused, to give the following instruction:

“‘This is a criminal trial on an information for felony, and all the questions of law and fact in the case are exclusively for the jury, and the jury are paramount judges, both of the law and the facts.’

“The court held they were judges of law and fact under some restrictions and conditions, but not in the absolute way indicated.

“The precise definition of the rights of a jury in criminal cases is easier understood than expressed. Their decision upon the guilt or innocence of a prisoner can never be directly reviewed, and upon an acquittal there can be no new trial. But, if they have the legal authority claimed in the request, their verdict of guilty would be of the same force as their acquittal. In this country, for a long time past, exceptions have been usually allowed to the rulings of the court on the trial, and, if those rulings are erroneous, the conviction will be set aside. But this can only be upon the idea that the jury are expected to follow the charges given; and it is as contrary to the law, as usually administered, to refuse to give a proper charge, as to give an improper one. And if a judge were to decline to give any charge,—as he might, if it is of no importance,—it has been assumed that he would violate his duty.

“The law does not favor unnecessary intrusions by one functionary upon ground of others. But the charge of a

judge in criminal cases is one of the ancient and traditional incidents of a trial, which must have been introduced for some purpose, and must have some value. It is certain that there is a great body of authority holding it to be meant for the guidance and instruction of the jury, and entitled to their respect. It is true that juries in criminal cases cannot properly find a conviction against their consciences. It is also true that they cannot be questioned or held responsible upon their verdict, nor called on to explain its reasons. Whether those reasons are based on a doubt or disbelief of evidence, or on a rejection of the exposition of law given by the court, they are equally beyond review. At common law a conviction was as final as an acquittal, and could only be relieved by a pardon. And it is very well understood that this immunity from censure or review is necessary to liberty. A jury cannot be compelled, in dealing with crimes, to separate the facts from the law. The right to give a general verdict is essential to the integrity of the system, and all attempts to deprive juries in criminal cases of that power have been opposed as destructive of the system. And experience has shown that special verdicts in such cases have not been favorable to justice. We need not hesitate to determine that it is within the *power* of juries to act upon their own view of the law. But it does not follow from this that the law does not assume that they will respect the instructions of the court.

“The power of juries in criminal and civil cases is the same in kind, though different in degree. The practice of disregarding or relieving against wrong verdicts in civil cases is one largely of modern growth. In early times verdicts were substantially conclusive. In modern times, though they may be set aside, they cannot be reviewed or altered. And setting aside verdicts as against law is a matter of discretion, and not of right. An appellate court can only review the action of the judge, not that of the jury. And this, too, is not by virtue of the old law, but by force of statutes, which, though ancient, are yet later in origin than jury trials. The jury system is generally regarded as deriving one of its chief advantages from having the law applied to the facts by persons having no permanent offices as magistrates, and who are not likely to get into the habit of disregarding any circumstances of fact, or of forcing cases into rigid forms and arbitrary classes. It is especially important, where guilt

depends on a wrong intent, to give full weight to every circumstance that can possibly affect it; and professional persons are under a constant temptation to make the law symmetrical by disregarding small things. But it is necessary, for public and private safety, that the law shall be known and certain, and shall not depend on each jury that tries a cause. And the interpretation of the law can have no permanency or uniformity, and cannot become generally known, except through the action of courts.

"It may be fairly regarded as one of the best features of the jury system that the law, though interpreted by professional interpreters, can only be applied to facts through the understanding of ordinary men of average capacity, and usually including in their number some of very simple minds. By this process it is divested of all that would not be readily comprehended by all men. In this way overnicety and technicality become less dangerous, if not absolutely harmless; and an apparent deviation in the verdict from the rules laid down is often no departure from the rules as supposed to be laid down.

"But, if the court is to have no voice in laying down these rules, it is obvious that there can be no security whatever, either that the innocent may not be condemned, or that society will have any defense against the guilty. A jury may disregard a statute just as freely as any other rule. A fair trial in time of excitement would be almost impossible. All the mischief of *ex post facto* laws would be done by tribunals and authorities wholly irresponsible, and there would be no method of enforcing with effect many of our most important constitutional and legal safeguards against injustice. Parties charged with crime need the protection of the law against unjust convictions quite as often as the public needs it against groundless acquittals. Neither can be safe without having the rules of law defined and preserved, and beyond the mere discretion of any one. We must construe the jury system, like all other parts of our legal fabric, in the light of history and usage. It came into this country as a part of our common law, and it has been fixed by our constitutions as a known and regular common-law institution. Like many of our best heritages from that source, we know what it is better than how it was devised, or (which is more probable) came into use without devising. We must look to the use as evidence of the law. And, look-

ing to that, we find that the judge has always assumed to give the jury instructions upon the law. We find, further, that, while there have been severe complaints and stern measures to secure them from his control on the facts, there has never been any attempt to abolish the practice of charging on the law. All the improvements in mitigation of the old system have gone upon the ground that the jury were expected to follow the instructions of the court. The introduction of reserved cases and criminal exceptions would be little short of an absurdity on any other theory. If there were any grounds of complaint, it would not be for wrong instructions, but for giving any charge at all. There is much difficulty in dealing with arguments which assume to qualify a system, and yet are not consistent with its uniform history. A jury system without a presiding judge who is something more than a puppet is not the jury system which we have inherited.

"It would not be profitable to collate or discuss the authorities at length. They differ in terms more than in substantial results. If the charge is proper, it can only be so because it is to be respected. If juries disregard it, they may be free from personal risk, and in cases of acquittal their verdict is conclusive. But the power to do wrong with impunity does not make wrong right. The same thing cannot be lawful and unlawful when done by different persons.

"We understand the uniform practice, and the decided weight of opinion, to require that the judge give his views of the law to the jury as authority, and not as a matter to be submitted to their review. And, while we recognize the power of the jury to give wrong verdicts, or to disregard the law, we are nevertheless warranted by usage and authority in holding that such conduct would be an abuse of their discretion, which could only be palliated by such tyrannical and perverse instructions as their good sense should teach them could not possibly be true or just."

In the discussion of the respective duties of the judge and jury, the eminent jurist, Justice COOLEY, says, at page 392, Cooley, Const. Lim. (6th Ed.):

"And the jurors must be left free to act in accordance with the dictates of their judgment. The final decision upon the facts is to rest with them, and interference by the court, with a view to coerce them into a verdict against their convictions, is unwarrantable and irregular.

A judge is not justified in expressing his conviction to the jury that the defendant is guilty upon the evidence adduced. Still less would he be justified in refusing to receive and record the verdict of the jury, because of its being, in his opinion, rendered in favor of the prisoner when it ought not to have been. He discharges his duty of giving instructions to the jury when he informs them what, in his view, the law is which is applicable to the case before them, and what is essential to constitute the offense charged; and the jury should be left free and unbiased by his opinion to determine for themselves whether the facts in evidence are such as, in the light of the instructions of the judge, make out beyond any reasonable doubt that the accused party is guilty as alleged.

"How far the jury are to judge of the law as well as of the facts is a question a discussion of which we do not propose to enter upon. If it be their choice to do so, they may return specially what facts they find established by the evidence, and allow the court to apply the law to those facts, and thereby to determine whether the party is guilty or not. But they are not obliged in any case to find a special verdict. They have a right to apply for themselves the law to the facts, and to express their own opinion, upon the whole evidence, of the defendant's guilt. Where a general verdict is thus given, the jury necessarily determine in their own mind what the law of the case is, and, if their determination is favorable to the prisoner, no mode is known to the law in which it can be reviewed or reversed. A writ of error does not lie on behalf of the commonwealth to reverse an acquittal, unless expressly given by statute, nor can a new trial be granted in such a case; but neither a writ of error nor a motion for a new trial could remedy an erroneous acquittal by the jury, because, as they do not give reasons for their verdict, the precise grounds for it can never be legally known, and it is always presumable that it was given in favor of the accused because the evidence was not sufficient in degree or satisfactory in character, and no one is at liberty to allege or assume that they have disregarded the law.

"Nevertheless, as it is the duty of the court to charge the jury upon the law applicable to the case, it is still an important question whether it is the duty of the jury to receive and act upon the law as given to them by the judge, or whether, on the other hand, his opinion is advisory only, so that they are at liberty either to follow

it if it accords with their own convictions, or to disregard it if it does not. In one class of cases (that is to say, in criminal prosecutions for libels) it is now very generally provided by the state constitutions or by statute that the jury shall determine the law and the facts. How great a change is made in the common law by these provisions it is difficult to say, because the rule of the common law was not very clear upon the authorities; but for that very reason, and because the law of libel was sometimes administered with great harshness, it was certainly proper and highly desirable that a definite and liberal rule should be thus established. In all other cases the jury have the clear legal right to return a simple verdict of guilty or not guilty, and in so doing they necessarily decide such questions of law as well as of fact as are involved in the general question of guilt. If their view conduce to an acquittal, their verdict to that effect can neither be reviewed nor set aside. In such a case, therefore, it appears that they pass upon the law as well as the facts, and that their finding is conclusive. If, on the other hand, their view leads them to a verdict of guilty, and it is the opinion of the court that such verdict is against law, the verdict will be set aside and a new trial granted. In such a case, although they have judged of the law, the court sets aside their conclusion as improper and unwarranted. But it is clear that the jury are no more the judges of the law when they acquit than when they condemn, and the different result in the two cases comes from the merciful maxim of the common law which will not suffer an accused party to be twice put in jeopardy for the same cause, however erroneous may have been the first acquittal. In theory, therefore, the rule of law would seem to be that it is the duty of the jury to receive and follow the law as delivered to them by the court; and such is the clear weight of authority. There are, however, opposing decisions, and it is evident that the judicial prerogative to direct conclusively upon the law cannot be carried very far, or insisted upon with much pertinacity, when the jury have such complete power to disregard it, without the action degenerating into something like mere scolding. Upon this subject the following remarks of Mr. Justice BALDWIN, of the Supreme Court of the United States, to a jury assisting him in the trial of a criminal charge, seem peculiarly dignified and appropriate, and at the same time to embrace about all that can properly be said to a jury on this subject:

“In repeating to you what was said on a former occasion to another jury, that you have the power to decide on the law as well as the facts of this case, and are not bound to find according to our opinion of the law, we feel ourselves constrained to make some explanations not then deemed necessary, but now called for from the course of the defense. You may find a general verdict of guilty or not guilty, as you think proper, or may find the facts specially, and leave the guilt or innocence of the prisoner to the judgment of the court. If your verdict acquits the prisoner, we cannot grant a new trial, however much we may differ with you as to the law which governs the case; and in this respect a jury are the judges of the law, if they choose to become so. Their judgment is final, not because they settle the law, but because they either think it is not applicable, or do not choose to apply it to the case. But if a jury find a prisoner guilty, against the opinion of the court on the law of the case, a new trial will be granted. No court will pronounce a judgment on a prisoner against what they believe to be the law. On an acquittal there is no judgment, the court do not act and cannot judge, there remaining nothing to act upon. This, then, you will understand to be what is meant by your power to decide on the law; but you will still bear in mind that it is a very old, sound, and valuable maxim in law that the court answers to questions of law, and the jury to facts. Every day's experience evinces the wisdom of this rule.’ *U. S. v. Wilson*, Baldw. 108.”

In *Sparf v. U. S.*, 156 U. S. 51, there is an exhaustive collation of the authorities bearing upon this question. The court was divided upon the right of the judge to instruct the jury upon the legal presumptions arising from a given state of facts. Some of the judges were of the opinion that the jury was the judge of the law as well as the facts. In the majority opinion, which is in accord with the views of Justice CAMPBELL and Justice COOLEY which we have already quoted, the court is careful to indicate that, while the judge may instruct the jury as to the law of the case which governs it, he may not compel a verdict. The language is as follows:

“We have said that, with few exceptions, the rules which obtain in civil cases in relation to the authority of the court to instruct the jury upon all matters of law arising upon the issues to be tried are applicable in the trial of criminal cases. The most important of those exceptions is that it is not competent for the court in a criminal case

to instruct the jury peremptorily to find the accused guilty of the offense charged, or of any criminal offense less than that charged. The grounds upon which this exception rests were well stated by Judge McCrARY (Mr. Justice MILLER concurring) in *U. S. v. Taylor*, 3 McCrary, 500, 505. It was there said:

“In a civil case, the court may set aside the verdict, whether it be for the plaintiff or defendant, upon the ground that it is contrary to the law as given by the court; but in a criminal case, if the verdict is one of acquittal, the court has no power to set it aside. It would be a useless form for a court to submit a civil case involving only questions of law to the consideration of a jury, where the verdict, when found, if not in accordance with the court's view of the law, would be set aside. The same result is accomplished by an instruction given in advance to find a verdict in accordance with the court's opinion of the law. But not so in criminal cases. A verdict of acquittal cannot be set aside, and, therefore, if the court can direct a verdict of guilty, it can do indirectly that which it has no power to do directly.”

“We are of opinion that the court below did not err in saying to the jury that they could not, consistently with the law arising from the evidence, find the defendants guilty of manslaughter, or of any offense less than the one charged; that, if the defendants were not guilty of the offense charged, the duty of the jury was to return a verdict of not guilty. No instruction was given that questioned the right of the jury to determine whether the witnesses were to be believed or not, nor whether the defendants were guilty or not guilty of the offense charged. On the contrary, the court was careful to say that the jury were the exclusive judges of the facts, and that they were to determine—applying to the facts the principles of law announced by the court—whether the evidence established the guilt or innocence of the defendants of the charge set out in the indictment.

“The trial was thus conducted upon the theory that it was the duty of the court to expound the law, and that of the jury to apply the law as thus declared to the facts as ascertained by them. In this separation of the functions of court and jury is found the chief value, as well as safety, of the jury system. Those functions cannot be confounded or disregarded without endangering the stability of public justice, as well as the security of private and personal rights.”

In *People v. Mortimer*, 48 Mich. 37, it is said:

"In this State, in criminal as well as in civil cases, it is the duty of the court to instruct the jury upon the law, and it is the duty of the jury to accept the ruling. *Hamilton v. People*, 29 Mich. 173. It is, no doubt, in their power to disregard evidence, and to acquit persons whom they know to be guilty."

In *People v. Richmond*, 59 Mich. 570, the trial judge made a ruling, when the counsel for defendant said, "Of course, that ends the case." The court then directed a verdict of guilty, and the jury returned such a verdict. In disposing of the case the court said: "As defendant himself had sworn to his own guilt, and counsel had made the remark referred to, the court was right in so holding. Where all the facts are admitted, there is nothing for the jury to pass upon."

In the case of *People v. Kirsch*, 67 Mich. 539, the facts were agreed to and were admitted. The court directed a verdict, but the verdict was rendered by the jury.

In the case of *People v. Neumann*, 85 Mich. 98, the following language is used:

"Whenever there is no question of intent in a criminal case, and no inferences, about which reasonable men might differ, to be drawn from the facts, and where, upon the admitted facts, the only question to be determined is whether, under the law, the statute has been violated, the trial judge may, with perfect propriety, state to the jury that the law applied to the facts, which are undisputed, shows the defendant to be guilty of the offense charged, and that it is their duty so to find under the facts and the law. But it has been repeatedly held that he cannot, in so many words, direct them that they must bring in a verdict of guilty; and that they are at liberty to find otherwise, if they see fit, under the Federal Constitution, which guarantees to every accused person 'the right to a speedy and public trial by an impartial jury of the State and district wherein the crime shall have been committed.' And verdicts have often been set aside when directed by courts in opposition to this right. See *U. S. v. Taylor*, 3 McCrary, 500, 11 Fed. 470, and cases there cited. But in this State, where a judge has directed

a verdict of guilty, and the jury have followed such direction, and the facts are admitted or undisputed, and the only question is one of law, applied to such facts, a new trial will not be granted, if the judge was right in his application of the law. No injustice can be done the accused in such case, as it is not to be presumed that a jury will find in opposition to the law from mere whim, caprice, or prejudice, although they may have the right to do so. In this ruling we do not intend to encourage the practice of directing a verdict against the accused in criminal cases. In all such cases the jury should be permitted to retire to the jury-room, and there deliberate, and the trial judge should content himself by stating the law as applied to the facts, and with an admonition to the jury of their plain duty in the premises."

In *People v. Collison*, 85 Mich. 105, the facts were admitted. The judge directed a verdict, and, without sending the jury out, directed the clerk to enter the verdict. The court set the verdict aside, using this language:

"We think, however, that the court erred in discharging the jury, and directing a verdict of guilty to be entered by the clerk. In no sense can this be said to have been a trial by a jury. The verdict of the jury is absolutely wanting. If the defendant in a criminal case cannot waive a trial by jury, it is difficult to see how this conviction can be sustained. In the case of *People v. Neumann*, 85 Mich. 98, and in the several cases therein referred to in support of the conclusion arrived at there, the jury acquiesced in the direction of the court; but here the court gave the jury no opportunity to follow or to refuse to follow the court's direction; in fact, there was no direction to the jury, but one to the clerk to enter a verdict."

In *People v. Repke*, 103 Mich. 459, it is held that, in criminal as well as civil cases, it is the duty of the judge to instruct the jury as to the law of the case; citing *Hamilton v. People*, *supra*, and *People v. Mortimer*, *supra*; the judge adding:

"But, as was said in the last case, 'It is, no doubt, in their power to disregard evidence, and to acquit persons whom they know to be guilty.' The court in the present

case did recognize this power, and expressly told the jury that they could acquit, but, if they found the respondent guilty at all, it must be for murder in the first degree."

The question was submitted to the jury, and the verdict was returned by them.

In *People v. Hawkins*, 106 Mich., at page 488, is a statement of what was done, in the following language:

"It is not claimed that the evidence stated by the court is disputed, and the point of this request appears to be that the jury should not have been told the court's opinion about it. He prefaced what he said about the evidence by leaving the question to them, and followed it by sending them to their room to determine the question of guilt or innocence. It is settled by former adjudications that it is the duty of the jury to take the law from the court, and that where there is no conflict in the evidence, and the defendant in open court admits facts legally constituting an offense, the court may so state, and even go so far as to direct a verdict. In this case the defendant had practically sworn to his own guilt, yet, in the abundance of his caution, the court left the question of intent to the jury. *People v. Richmond*, 59 Mich. 570; *People v. Ackerman*, 80 Mich. 588."

Our attention has not been called to a case in which the judge undertook to enter a verdict for the jury when the latter failed to follow the instructions of the court, and it is not believed such a case can be found. The cases of *People v. Neumann*, *supra*, and *People v. Collison*, *supra*, indicate very clearly that, should a judge attempt to return a verdict for the jury, he would be trespassing upon the province of the jury. In all the cases where a verdict was directed, the only question involved was a question of law. As a rule, the facts were admitted, so that it was simply a question of whether the admitted facts under the law showed respondent was guilty of the crime. Here the facts were not admitted. It became the duty of the people to show by competent evidence the guilt of the accused. It was for the court to say what evidence was competent, and to decide whether it should be admitted or not; but, after it was admitted, it was for

the jury to say what weight should attach to it. The jury were not obliged to believe a witness simply because he had been sworn. Can it be said that in this case the action of the jury cannot be accounted for upon the theory that they did not believe some of the witnesses? Whether that can be said or not, the fact remains that, under the Constitutions of the United States and this State, before a respondent can be convicted of a felony upon a plea of not guilty, a verdict of guilty must be rendered against him by the jury. While it is the duty of the jury to take the law from the judge, and be guided by it, still, if the jury does not do its duty, its failure to do so does not confer upon the judge added power, and authorize him to usurp the functions of the jury, and return a verdict of guilty himself. The right of the trial judge to direct the jury in relation to the law of the case is not conceded in all of the courts, but, as we have already seen, that question is no longer an open one in this State. When, in addition to that right, it was held that, in cases where the facts were admitted, the trial court might direct the jury to return a verdict of guilty, the border line separating the functions of the trial judge from the province of the jury was reached. If another step is to be taken, and, in addition to the right to direct a verdict, it is held the judge may, when the jury is unwilling to follow the direction of the court, compel a verdict, then the border line is passed, the judge has entered upon the province of the jury, the constitutional guaranty of a right of trial by jury in criminal cases is overthrown, and the judge has drawn to himself power which has not been exercised by any trial judge since the days of *Magna Charta*.

The statute under which this information is filed reads as follows:

“The People of the State of Michigan enact, That if any person holding any public office in this State, or if the agent or servant of such person, knowingly and unlawfully appropriates to his own use, or to the use of any other person, the money or property received by him in

his official capacity or employment, of the value of fifty dollars or upwards, the person so offending shall be deemed guilty of a felony, and shall, upon conviction, be punished by imprisonment in the state prison, at hard labor, not to exceed ten years, or by fine not exceeding five thousand dollars, or both said fine and imprisonment." 3 How. Stat. § 9263a.

It is the claim of the attorneys for respondent in relation to this statute that before one can come within its provisions, so as to make himself a felon, he must knowingly and unlawfully appropriate the money to his own use, or to the use of some other person, with an intent to so appropriate it as to forever exclude the rightful owner from its use and possession. We do not think the statute is susceptible of such construction. Section 9263c provides that the failure or refusal of any public officer to pay over and deliver to his successor all moneys and property which should be in his hands as such officer shall be *prima facie* evidence of the offense. It is true that in *People v. Seeley*, 117 Mich. 263, it was said that a *prima facie* case may be rebutted, as in that case, by showing the money which should be in respondent's hands never came to him. I suppose, too, that, if the accused was prevented from paying over the money by its being burned or stolen when in a proper place of deposit, that would rebut the implication that he had knowingly and unlawfully appropriated it to his own use. Other things might arise which would excuse him. It cannot be said of most men that, when they use public funds, they mean to permanently retain them. Experience shows that frequently they are lost because used for speculative purposes; the user expecting to return them, but failing to do so because his speculation did not turn out as he expected. The intention of the statute was to prevent any public official from using money or property coming to him in his official capacity for any other purpose than the purpose for which it came to him. If he does knowingly use it, or permit others to do so, for other purposes than the one for

which it was intrusted to him, then he comes within the provisions of the statute.

It is necessary to refer to but one other assignment of error. Mr. Lemon, who was one of the bondsmen of respondent, had testified to admissions made to him by respondent, and to payments made by his fellow bondsmen and himself. Upon cross-examination it was attempted to show all the conversation he had upon that occasion with the respondent, and the entire transaction about the payment. This was excluded. We think it proper cross-examination, and that it should have been admitted.

For the errors mentioned the conviction is reversed, and a new trial ordered.

The other Justices concurred.

BLOOMER *v.* DAU.

1. MORTGAGES—AGENT FOR COLLECTION.

The fact that a note and mortgage are made payable at a certain bank does not constitute the bank an agent to collect the same.

2. SAME—PAYMENT—POSSESSION OF PAPERS—PAYOR'S RISK.

A mortgagor who pays his mortgage to a banker who has been the mortgagee's general agent, knowing that the banker no longer has the note and mortgage in his possession, but relying, without inquiry as to the continuance of the agency, upon the banker's statement that he will secure the proper discharge, does so at his own risk.

3. SAME—REVOCATION OF AGENCY—ESTOPPEL.

Where a mortgagee withdrew the mortgage and note from the possession of a bank which had acted as his general agent for collection, and notified the mortgagor of the termination of the agency by a letter which, owing to the latter's having

changed his address, did not reach him before the mortgage fell due and was paid by him to the bank, which failed without accounting for the proceeds, and before the mortgagee knew of the payment, the mortgagee was not estopped to deny the bank's authority to receive the money by his mere delay in bringing suit to foreclose the mortgage.

MOORE, J., dissenting.

Appeal from Kent; Grove, J. Submitted November 14, 1899. Decided December 30, 1899.

Bill by Reuben Bloomer against Magnus Dau, Mary C. Dau, and Jacob Mann to foreclose a mortgage. From a decree dismissing the bill, complainant appeals. Reversed.

Bill to foreclose a mortgage for \$375, dated December 4, 1888, due December 4, 1893, given to one Coles A. Bloomer, the assignor of complainant. Coles A. Bloomer and complainant were brothers, and had been in partnership. Upon the dissolution of the partnership and the division of the property, the note and mortgage, with other securities, were assigned to complainant. One Cheney had a bank at Sparta. Bloomer Bros. did their banking business at his bank. The note and mortgage in this case, together with others, were left there for collection of both interest and principal. On the dissolution of the partnership, complainant left his securities there, without any further instructions to Cheney, who continued to collect interest and principal. When the moneys were collected, they were entered upon the bank books to the credit of the firm, and afterwards of complainant, who checked them out as desired. It was customary for Cheney to receive the principal and interest upon these securities, and then notify complainant (but he did not always do it), who would execute the necessary discharges either at Sparta or Grand Rapids. No instructions were given Cheney by complainant at any time in reference to his notes and mortgages. About the 1st of November, 1893,

complainant withdrew from Cheney's bank all his notes and mortgages, and took them to Grand Rapids, where he resided. He then notified Mr. Cheney, and wrote letters to his debtors, that he would thereafter attend to his own business, and to pay their indebtedness to him at Grand Rapids. Complainant was told by his brother that Mr. Dau's business address was Sparta; and that at one time was his post-office address, but was not when the letter mentioned below was sent. Complainant, on November 6, 1893, addressed a letter to Mr. Dau, notifying him that he had his office in Grand Rapids, and, when he wished to pay on his note and mortgage, to call on him under the Fourth National Bank in Grand Rapids. Mr. Dau's address at that time was at Gooding. The letter was duly advertised at Sparta; was forwarded to the dead-letter office at Washington; was returned to complainant from the dead-letter office by letter dated January 17, 1894. Upon receiving this letter he saw Mr. Dau, who told him that he had paid the note and mortgage, when due, to Mr. Cheney. Meanwhile Cheney had failed, and had not notified complainant of the payment of the mortgage. Cheney entered the amount to complainant's credit upon the bank books. Dau obtained the money from defendant Mann, giving him a mortgage upon the same land as security. Dau and Mann met by agreement at Cheney's bank to consummate the transaction. The amount due exceeded \$350 borrowed of Mann. Dau was to pay the excess, which he did before Mann arrived. Then Mann and Dau went together into the bank, where Mann paid to Cheney the \$350. Neither Dau nor Mann asked where the note and mortgage were, or for their surrender. Neither did either of them ask Cheney if he still had authority to collect the money. Dau said nothing about the note and mortgage. All that was said about them appears in the following testimony of Mr. Mann:

"I simply paid the money over to Cheney, the \$350, after we got Cheney to read my mortgage; and he did not have the Bloomer mortgage there, and I said, 'How

will it be about that Bloomer mortgage?' Cheney says, 'That is all right; I will see that it is taken off from the records.'"

Neither Dau nor Mann afterwards took any steps to obtain possession of the note and mortgage or a discharge. The mortgage and note were made payable at Cheney's bank. Mr. Dau had regularly paid his interest there. Mr. Cheney gave the following receipt: "Received of Magnus Dau, per J. Mann, three hundred fifty dollars, for balance of mortgage held by Reuben Bloomer against him." About four years after this transaction, complainant commenced the foreclosure of this mortgage. Defendants answered, averring payment, and prayed for a discharge of the mortgage. Decree was entered dismissing complainant's bill, and granting relief to the defendants.

Wanty & Knappen, for complainant.

Wolcott & Ward, for defendants.

GRANT, C. J. (*after stating the facts*). Complainant and defendants acted in entire good faith. Upon whom of the innocent parties shall the loss fall? We think the evidence justifies the conclusion that Mr. Cheney was the general agent of complainant and his assignor for the collection of the notes, mortgages, and other securities which had been intrusted to him for collection, including the note and mortgage in dispute, up to the time the agency was revoked. The notes and mortgages were placed in the hands of Mr. Cheney to be surrendered when payment was made. But this authority was expressly revoked, and all the notes and mortgages taken away from the possession of Mr. Cheney. His agency was thereby canceled, and he had no authority whatever to receive payments. Complainant performed his legal duty in notifying his debtors who had previously done business with Cheney in reliance upon that authority. Had the letter to Mr. Dau been directed to his then post-office address and

been received by him, complainant would have done all the law required to protect himself and to notify Mr. Dau of the termination of Cheney's agency.

When the debtor pays his debt, he is entitled to a surrender of the written evidence of that debt. Creditors usually place the bonds, notes, and mortgages they desire to have paid into the hands of their agent whom they authorize to collect. The absence of such papers is usually sufficient to place the debtor upon inquiry as to the agent's authority. A general agency continues until in some way parties have been notified of its termination, or have sufficient facts in their possession to put them upon inquiry. Banks are collection agencies, and the courts will take judicial notice of the fact that notes and other evidences of debt accompany the agency, and are placed in their hands, to be surrendered when the debt is paid. It must be presumed, therefore, that defendants knew that this was the customary method of doing business, and that this bank would, in the due course of business, if its agency continued, have the note and mortgage in its hands for surrender. There is another reason why they should be in the agent's hands, namely, for a correct computation of the amount due. Where one withdraws from his agent the instruments evidencing debts, there is an implied revocation of the authority of the agent. Story, Ag. § 475. Defendants knew that the bank did not have the note and mortgage. They chose to rely upon Mr. Cheney's word that he would procure the discharge from the complainant. We must assume that Cheney would have told the truth if defendants had asked about his agency, and, if so, an inquiry would have disclosed the fact that he was not authorized to receive the money, and that, if they chose to leave it there, the bank would become their agent, and not complainant's. The fact that the note and mortgage were made payable at Cheney's bank does not establish the agency. *Trowbridge v. Ross*, 105 Mich. 600, and authorities cited; *Adams v. Improvement Co.*, 44 N. J. Law, 638 (43 Am. Rep. 406).

We said in *Joy v. Vance*, 104 Mich. 97:

"He [the mortgagee] had a right to suppose that the mortgagor would not pay notes or mortgage without receiving them, and by keeping them in his own hands he interposed the only practical obstacle to the perpetration of a fraud by the mortgage company."

If that is sound law, why has not the mortgagee interposed this same practical obstacle by withdrawing the note and mortgage from his agent and expressly canceling his authority? If the bank had had the note and mortgage to deliver, defendants' contention would be sound, even though complainant had expressly terminated the agency. We are of the opinion that the defendants had no right to assume that the agency continued, in the presence of knowledge that the bank did not have the papers, and that they dealt with the bank-at their own risk.

We find no room for the application of the doctrine of estoppel. The bank had failed before complainant had any notice or knowledge of the payment. He promptly notified Mr. Dau of the letter written him, and that Cheney had no authority to receive the money. His silence after that, and his failure to commence foreclosure, do not constitute an estoppel. Complainant's delay in bringing suit would no more estop him than would Dau's failure to institute a suit to procure a discharge of the mortgage estop him from claiming payment.

The decree must be reversed, and decree entered for the complainant.

MONTGOMERY, HOOKER, and LONG, JJ., concurred with GRANT, C. J.

MOORE, J. (*dissenting*). I do not reach the same conclusion as Justice GRANT. I agree with him that Mr. Cheney was the general agent of the complainant for the collection of this and other notes and mortgages. The record also discloses that Mr. Dau knew of that fact, for he had paid him interest on the mortgage before he paid the principal. The note was payable at the bank of Mr.

Cheney. The principal of the mortgage and the balance of the interest were paid to Mr. Cheney the 5th day of December. It is not disputed that Mr. Dau had not received the letter Mr. Bloomer sent him at this time. The fact that Mr. Bloomer deemed it necessary to send such a letter indicated that he understood Mr. Dau knew Mr. Cheney had authority to receive the payment. When the money was received by Mr. Cheney it was placed to the credit of Mr. Bloomer, just as other sums of money paid on mortgages had been done. Mr. Bloomer testified that the letter came back from the dead-letter office having the Washington postmark, "Jan'y 17." On the direct examination he testified :

"I have had talk with Dau concerning his not getting this letter, in my office about a year ago. I asked him why he did not get the letter. I said, 'You used to get your mail there.' He said he did used to get it there in 1888. He said now he got his letters at Gooding. Before this conversation I had seen Dau in regard to his having paid money to Cheney, at his farm in January, 1894, about the time Cheney failed. I drove up to his place and asked him in regard to the note and mortgage. I asked him why he paid the note there. I said I notified him by letter, and he said he did not get the letter. I said, 'Did you get your note?' He said, 'No; Am. was going to get that.' Said he was going to get it discharged. He said Am. was going to get it discharged, meaning the witness Cheney. He says, 'You take that off the books.'"

On the cross-examination he testified :

"I think I went to see Dau before I got that letter back. I cannot tell you now whether I went to see Dau. I found that he had paid the amount of the mortgage to Cheney. I do not know whether, when I found out from Dau that he had paid the money to Cheney, that the latter was still doing business at the bank. I went there as soon as I heard it was paid. Mr. Cheney was there. I talked the matter over with him. I asked him for the money that was deposited to my credit. He said he hadn't got any. He did not promise that he would get it for me soon. I asked him if he had got the money,—what credit it was. It strikes me it was the Dau mortgage. 'Well,'

I says, 'have you got the money?' He said, 'No.' 'Well,' I said, 'I don't want any more of this kind of business.' And that was the end of the conversation."

The testimony does not disclose that, when Mr. Dau told him of the payment, he repudiated the authority of Mr. Cheney to receive the payment, and told Mr. Dau he should hold him liable on the note and mortgage; but, on the contrary, he had an interview with Mr. Cheney at the bank, and learned the money had been placed to his credit. He did not then repudiate Mr. Cheney's act, but informed him, when he learned he did not have the money, "I don't want any more of this kind of business." The record discloses the bank continued to do business until January 30th, and for nearly four years Mr. Bloomer remained silent. It was not until the January before the commencement of this suit, when Dau asked him to discharge the mortgage, that he repudiated the act of Cheney, and said he was going to see whether Dau had the right to pay the money to Cheney. The case comes directly within *Wilson v. La Tour*, 108 Mich. 547; *Ziegan v. Stricker*, 110 Mich. 282.

I think the circuit judge made a proper disposition of the case, and the decree should be affirmed.

BUCK v. COWARD.

1. CONTRACTS—RESTRAINT OF TRADE—LIMITATIONS.

A provision of a contract for the sale of one's right, title, and interest in a certain business, whereby the seller agrees not to re-engage in such business, is not void for failure to limit the place wherein he is restrained from operating, if, construed in the light of the surrounding circumstances, it is apparent that only a reasonable limitation was intended.¹ *Hubbard v. Miller*, 27 Mich. 15, followed.

2. SAME—WAIVER.

By consenting that the seller re-engage in business, and allowing him to carry on such business for nearly three years without objection, the purchaser waives the right thereafter to insist upon the observance of the provision.

Appeal from Branch; Yapple, J. Submitted November 14, 1899. Decided December 30, 1899.

Bill by Philo A. Buck against Richard Coward, Wallace Monroe, and William Monroe to restrain them from carrying on a certain business in violation of their agreement to refrain therefrom. From a decree dismissing the bill, complainant appeals. Affirmed.

Charles N. Legg, for complainant.

John B. Shipman, for defendants.

MOORE, J. The complainant, in the latter part of 1897, filed this bill for the purpose of restraining defendants from selling flour and buying and shipping grain in the village of Bronson. It is the claim of the defendants:

1. That the contract set up by complainant is in restraint of trade.

¹ As to the validity of contracts in restraint of trade without limitation of place, see note to *Gamewell, etc., Telegraph Co. v. Crane*, (Mass.) 22 L. R. A. 673.

2. That the business they are engaged in is not the business they sold complainant.

3. That the complainant consented to their engaging in the business they are now doing.

The testimony was taken in open court, and, after hearing it, the circuit judge dismissed the bill. The complainant brings the case here by appeal.

The contract made between the complainant and Coward and Monroe, two of the defendants, is contained in a paper dated November 28, 1894, reading as follows:

“BRONSON, MICH., Nov. 28, 1894.

“Article of agreement between Coward & Monroe, of the first part, and Philo A. Buck, of the second part, *Witnesseth*: That the parties of the first part agree to sell and deliver to the party of the second part all of their right, title, and interest in the following business, to wit, the business of selling and exchanging flour and feed. They also agree not to purchase any grain for shipment, not otherwise provided for, during the time that the party of the second part shall see fit to remain in business, or without the consent of said party. The party of the second part agrees to take all property at its cost value, and assume the rent payment, the same as the party of the first part, and furthermore pay to the party of the first part a bonus of \$100 for the said business.

“In witness whereof, we have hereunto subscribed our names, this 28th day of November, 1894. This contract to take effect December 1st, 1894.

“COWARD & MONROE.

“P. A. Buck.”

This was supplemented on December 1st by a paper signed by Coward and Monroe, reciting that they,—

“In consideration of the sum of — dollars, lawful money of the United States, to them paid by Philo A. Buck, of Bronson, Branch county, Michigan, of the second part, the receipt whereof is hereby acknowledged, have bargained and sold, and by these presents do grant and convey, unto the said party of the second part, his executors, administrators, or assigns, all the flour and feed and one flour bin, according to a bargain entered into between the parties on the 28th day of November, 1894. It is further agreed that the said Richard Coward and Wallace

Monroe, in consideration of one hundred dollars, paid by the said Philo A. Buck, that they will not enter into the business of grain dealers, and all seeds, or the products of grain, without the consent of the said Philo A. Buck,—belonging to Richard Coward and Wallace Monroe, and now in their possession at the store owned by John T. Holmes, in the village of Bronson; to have and to hold the same unto the said party of the second part, his executors, administrators, and assigns, forever," etc.

It will be observed that the contract does not limit the place in which Coward and Monroe were not to do business, but we do not think that for that reason it can be said to be in restraint of trade. The case of *Hubbard v. Miller*, 27 Mich. 15, is on all fours with the case which complainant claims exists here. A reference to that case makes it unnecessary to say more about that feature of this case.

It is conceded, in the brief of the solicitor for the complainant, that the evidence does not show that defendants are buying and shipping grain contrary to their agreement. It is the claim of Coward and Monroe that the retailing of flour by them was but a small part of their business at the time they sold their business to the complainant. It is their claim that, while they were handling thousands of pounds of flour daily in their exchange business, they had not, in all, sold at retail a dozen sacks of flour, and that the retailing of flour could not be said to be a portion of the business which was sold. It is also their claim that they bought at chattel mortgage sale a grocery stock, containing in the stock flour, which was sold at retail, and that the only way in which they have sold flour was to continue to retail it in connection with the grocery stock. They assert that complainant consented to their doing this, and that sometimes they would get flour from Mr. Buck for their customers, and he would do the same thing for his customers, and that he made no objection, for nearly three years, to their retailing flour in connection with their grocery stock. Mr. Buck denies that he ever consented to the defendants' handling flour in the manner they did,

but he admits on cross-examination that, nearly three years before this suit was brought, he had some talk with Mr. Coward to the effect that, if they would procure their flour of him, he would submit to their handling flour. The witnesses were before the court. He had a great deal better opportunity to know who of them were truthful. We are inclined to think it is shown that complainant gave his consent to what was done by defendants.

The decree of the court below in dismissing the bill is affirmed, with costs.

The other Justices concurred.

GRINNELL v. ANDERSON.

ASSUMPSIT—WAIVER OF TORT—CONVERSION—EVIDENCE.

Plaintiffs, piano dealers, during the absence of defendant and his family, induced a neighbor to unlock defendant's house, and placed therein a piano, claiming that defendant's wife had agreed to receive it on trial. Defendant thereafter refused to buy the piano, or to surrender it until he should be paid for injury done by the movers to his lawn, porch, door-casing, and carpet. He never claimed to be the owner, and never refused plaintiffs possession, except conditionally, as stated. *Held*, that, there being no contract relation, and no conversion into money, plaintiffs were not within the rule permitting the waiving of tort and maintaining of *assumpsit* in a proper case.

Error to Shiawassee; Smith, J. Submitted November 15, 1899. Decided December 30, 1899.

Assumpsit by Ira L. Grinnell and Clayton A. Grinnell, copartners as Grinnell Brothers, against William Anderson, for the value of property alleged to have been converted

122	533
128	137
128	245
122	533
81W	829
122	533
153	83

by defendant. From a judgment for defendant, plaintiffs bring error. Affirmed.

Selden S. Miner (*William L. January*, of counsel), for appellants.

John T. McCurdy and *Fred J. Northway*, for appellee.

MOORE, J. This case was commenced by summons, in which defendant was summoned to answer the plaintiffs in a plea of trespass on the case upon promises. The case was tried before a jury, who rendered a verdict in favor of defendant. The case is brought here by writ of error.

There are 18 assignments of error, but I think it very clear that, under the case made by the plaintiffs, they are not entitled to recover in this form of action. It is their claim that, previous to the 5th of January, plaintiffs' agents had called at defendant's home on different occasions for the purpose of selling the defendant and his wife a piano, and had talked with the wife, and had shown her the catalogue, but were unable to find the defendant at home. They called again on the 5th of January, and found his wife at home. They asked her if she thought the defendant would buy a piano, and she said that, if they wanted to sell the defendant a piano, the only way to do so was to bring a piano to the house, and then see him, show him the piano, and play it for him. She said he liked music, and in playing it for him, if it was satisfactory, he would undoubtedly buy it. They told her they would put a piano in the house if she so desired. She asked them when it would be there, and they replied, "On Friday." She said, "All right." Friday morning they took the piano to the house, and found defendant's wife absent. They went to one of the neighbors, and found the key of the house, and the neighbor went over and unlocked the house. They put the piano in the house, where it has remained ever since. Mr. Grinnell and Mr. McGuinness, a few days afterwards, went to defendant's

house, and asked defendant's wife how Mr. Anderson liked the piano, and she answered by saying that her husband wanted to see them. They tried to see the defendant, but were unable to do so until sometime in April. They called at the house again on the 17th of February. Mrs. Anderson was at the door, and would not let them in, and informed them that Mr. Anderson had said not to let any one in the house. When Mr. Grinnell did see him, he says the following occurred:

"I asked him if I could sell him the piano, and he said, 'No.' I then offered him \$2, and told him, rather than to have any more trouble about it, I would give him \$2, and take the piano, and let it go,—settle it; that I would do that, and pay him for any trouble he considered he was to. I had two silver dollars there, and held it out to him. He did not take it. He didn't say much. He just laughed at me when I offered it to him. I asked him what he would take, and he said if I would give him \$25 he would let me have the piano."

He says he was then told he could not have the piano, and must not go near the house. After this he never made any request or demand for the piano.

It is the claim of defendant that plaintiffs saw the wife of defendant, and told her they had heard defendant wanted to buy a piano, and that she replied that she thought not,—that his preference was for an organ; that they then requested to put a piano in the house, as they wanted to put one in somewhere, and she told them, so far as she was concerned, she was willing, but they must see the defendant; that she had no further talk with them until her return home, when she found the piano in the house. The defendant is a conductor on a freight train, and is away from home a good deal. His wife says, about two weeks after the piano came, the men came to the house, and inquired what Mr. Anderson thought about the piano, when she informed them he was displeased at the way it was put into the house; that he wanted to see them; that they came again in his absence, and said very unpleasant

things to her. Defendant claims the first he saw of plaintiffs was two or three months after the piano was put in his house, when he had just been notified to take charge of a train; that at this time he had been informed of the conduct of the plaintiffs and their agent at his house, when the following occurred:

"I says: 'Gentlemen, I am called to go out. I have got to go home, get my supper, get a lunch, and go out. I have no time to talk piano tonight.' He says they would like to fix up the piano deal with me. I says: 'You can't sell me the piano. I never ordered one, don't want it, and have no time to talk with you on pianos tonight.' Mr. McGuinness says: 'There is this much about it: We have got your order for that piano.' I says, 'You have got my order?' I says, 'You haven't got anything of the kind,' or 'You can't show it.' He says, 'We have your wife's order.' I says, 'No; you can't show my wife's order for any piano.' He says, 'Of course, we haven't a written order, but we have a verbal order from her for the piano.' I says, 'You haven't got anything of the kind.' I says, 'My wife never lied to me, that I ever found out, and I take it for granted she told me the truth in this case; and you never had anything of the kind, and you never had permission to put the piano in there.'"

Some hot words occurred between the parties, but he claims no demand was made upon him for the piano. He says that at a subsequent talk with one of the plaintiffs the following occurred:

"I says, 'I am as ready to fix it up today as I ever will be.' I says, 'I am willing to fix it.' He says, 'As far as your trouble and bother is concerned, I am willing to pay you for the trouble we have put you to.' I says, 'That is all I want.' He went down in his pocket; offered me \$2. I says, 'Mr. Grinnell, it don't look hardly large enough to me.' I says: 'Of course, you might think it was all right, but I don't. I don't think that would pay me for what trouble and bother I have been to.' He says, 'What will satisfy you?' I says, 'I haven't any itemized account figured up, but, if you want to jump accounts, give me \$25 and I will be satisfied, or I will figure up itemized accounts and let it come to what it will.' He didn't make

any reply particularly, any more than he says, 'Well,' he says, 'we will be good friends anyway.' He never made any demand of any description. I did not at that time refuse to deliver up the piano, or at any other time have I refused."

He claims that, just before the piano was taken to his house, he had graded his lawn, and that it was badly cut up by plaintiffs in putting the piano into the house, and that some injury was done to the porch and door-casing and carpet. He disavowed any claim of title to the piano, and said it was still where placed by the plaintiffs.

If we understand the argument of counsel, it is that the wife acted as the agent of the husband in allowing the piano to be placed in his house, and that it was his duty to repudiate her acts, and, failing to do so, he affirmed the agency of the wife; citing *Cooper v. Mulder*, 74 Mich. 374. They urge that Anderson, through the act of his wife, became a bailee, and that, when he refused to deliver possession of the property, this amounted to a conversion (citing Cooley, Torts [1st Ed.], 448), and that the tort might be waived and suit brought in *assumpsit* (citing *Newman v. Olney*, 118 Mich. 545, and other cases). We think counsel misapprehended the effect of the testimony. Giving it the most favorable construction possible, the piano did not come into the possession of the defendant by virtue of any agreement upon the part of either the wife or the husband to purchase it. The first time the plaintiffs spoke to the husband about buying the piano, he refused to do so. There is no testimony tending to show that he claimed to be the owner of it. It is true he refused to surrender possession of it until he was paid for his trouble, but that is the only way in which he refused to surrender its possession. He never converted it to his own use, and has never sold it for money or anything else. The rule is that, before a party can waive the tort and sue in *assumpsit* for the conversion of personal property, the tortfeasor must have converted the property into money, or the relation existing between the parties must have had

its inception in contract. Neither of these situations existed in this case, and the judge might well have directed a verdict in favor of defendant. *Watson v. Stever*, 25 Mich. 386; *Tolan v. Hodgeboom*, 38 Mich. 624; *Tuttle v. Campbell*, 74 Mich. 652 (16 Am. St. Rep. 652).

Judgment is affirmed.

The other Justices concurred.

FRISBEE v. STEWART.

APPEAL—REVIEW—CONFLICTING EVIDENCE.

Where the testimony on a bill to cancel an assignment of notes and mortgages is taken in open court, a finding by the presiding judge on disputed questions of fact, involving the capacity of complainant to transact business and the genuineness of her alleged signature, is entitled to great weight on appeal.

Appeal from Clinton; Daboll, J. Submitted November 15, 1899. Decided December 30, 1899.

Bill by Amy E. Frisbee against Matthias L. Stewart, Charles D. Stewart, and L. Irving Stewart, copartners as M. L. Stewart & Co., to cancel an assignment of certain notes and mortgages. From a decree dismissing the bill, complainant appeals. Affirmed.

Almond G. Shepard and *Edwin H. Lyon*, for complainant.

Lyon & Hadsall, for defendants.

MOORE, J. The bill was filed in this case to cancel an assignment of two notes and mortgages purporting to

have been made to defendants by the complainant to secure the payment of her note for \$2,000. She claims she never executed the assignment and note. The testimony was taken in open court. The circuit judge who heard the testimony filed the following written opinion in the case:

"In September, 1897, one Charles Farmer, of Ovid, Clinton county, applied to Mrs. Frisbee, the complainant, for her indorsement of a promissory note, to assist him in raising money. She was willing to give it, and did, and he took it to the bank of the defendants at Owosso, and applied for a loan. He was told there by the defendants that they did not wish to loan the money on it as it then was, but that, if the complainant wanted to borrow the money direct on her own note, with proper collateral, they would make the loan direct to her. He returned to Mrs. Frisbee, and she delivered to him a large number of notes, mostly secured by mortgages, and they finally selected the two notes and mortgages in issue here, and, taking them collateral to the note made by her under this arrangement, advanced to her \$2,000, the same being delivered to Charles Farmer for her. This money, by the arrangement made between Farmer and complainant, he retained, and used for his own benefit. She now files this bill, and asks that the notes and mortgages be returned to her, and the assignment declared void, for two reasons: (1) Because she says she was infirm and feeble in mind, and did not have capacity to do business and deliver the notes and mortgages; and (2) because she never signed the assignment and acknowledgment of the assignment of the mortgages. Defendants' claim is that they acted in good faith, loaned the money direct to the complainant, and had no notice that there was anything wrong, or that there was any question about the competency of the complainant.

"I think the contention of the defendants must be sustained, and the bill dismissed. I am satisfied that the note was given, the assignment made, and the acknowledgment taken, as appears by the papers. It is true that, when the attention of Mr. Faxon, the notary, was first called to the matter, he did not remember the transaction, and he even made an affidavit to that effect; but, the paper being shown him, he at once recognized his signature, and, after some thought, recalled the circumstances

of the transaction, and now swears positively that he took the acknowledgment, and gives the time and place of the occurrence. Mr. Faxon is a reputable business man of Ovid, the postmaster, and well known to all the parties and to the court. I cannot think for a moment that he is not telling the truth, and must find that the note was signed, the mortgages assigned, and the assignment acknowledged, as they appear by the papers, and as claimed by the defendants.

"The question of the competency of the complainant is in the case, but, in my judgment, not so important as the other question. She certainly is not an imbecile. She is the widow of a gentleman of great business ability and shrewdness, and since his death, and for some years, has conducted her own affairs and managed her own estate, which is a large one. True, she may at times have had advice from her nephew and niece, who are with her most of the time, but there is no evidence that the management of the business and its control has ever been transferred to them, and the evidence discloses that the large number of notes and other papers were in her possession, and not in theirs, and that there has been no attempt to take the control of the business from her, or have a trustee appointed; and this was true up to the time of the trial of this case. I think she has not the strength of mind that she once had, but she seemed to comprehend what was being done in court, and to understand the issues involved, although somewhat feeble in health at the time of the trial; and it further appeared that since this transaction, and but a short time before the trial, she had given a deed of property near Chicago, and the solicitor in this case had taken and delivered it to the parties, who had never seen Mrs. Frisbee, and by his act had, it seems to me, certified to those parties that she was competent to transact that business. Certainly it would not do to say that, if it turned out to be a good bargain, she was competent, and, if a poor one, she might move to set it aside. I think the defendants are entitled to the benefit of the rule of law decided or announced in this class of cases in *Shoulters v. Allen*, 51 Mich. 529. There the court says:

"It is not necessary, however, to find that Allen, when the note was given, had capacity sufficient for the transaction of ordinary business. It is enough to sustain the note that plaintiff dealt with him in good faith, and without notice of want of capacity, in a transaction not calculated to put him on his guard."

"In this case Mr. Farmer for a long time had been a leading business man at Ovid. He was, it is true, at this time in failing circumstances, and this was known to the complainant, at least. Mrs. Frisbee was known by reputation to the bank as a woman in charge of and managing a large estate. No question had ever arisen, to their knowledge, as to her competency to properly manage it. Mr. Faxon was known to them as a business man, and the postmaster at Ovid. His certificate upon the assignment carried with it the presumption of competency and fair dealing, or at least understanding of the transaction. It seems clear to me that the defendants had a right to rely upon all this, and to advance the money, as they did, in good faith, upon the papers presented to them, and, in any view of the case, are entitled to protection.

"The bill will be dismissed, with costs to the defendants."

The questions involved are purely questions of fact. Their discussion would not be profitable to any one. The record is a very long one. The testimony is conflicting. We have the original papers before us, and also signatures for comparison, which are conceded to be genuine. While the case is not free from doubt, and some of the witnesses do not appear in an enviable position, we think the preponderance of proof is not in favor of the complainant. This, taken in connection with the fact that the witnesses were examined before the circuit judge, giving him a much better opportunity to observe the manner and appearance of the witnesses, and to judge of the credit to be given them, and to weigh the evidence, than we can have, leads us to affirm the decree of the court below, with costs.

The other Justices concurred.

POTTER v. MARTIN.

1. BANKRUPTCY—PETITION—AMENDMENT—OPERATION OF ASSIGNMENT.

Where a petition in bankruptcy was held insufficient, but, on amendment, was made the foundation of the proceedings, the assignment related back to the date of the filing of the original petition, and vested the assignee with the title to property then held by the bankrupt, as against a transferee from the bankrupt prior to the filing of the amended petition.

2. SAME—SALE BY ASSIGNEE—TIME.

A sale of property by an assignee in bankruptcy is not invalid because not made until six years after the order of sale.

3. SAME—CONFIRMATION—NECESSITY FOR.

Whether confirmation of a sale by an assignee in bankruptcy is essential to its validity,—*quære*; the court inclining to the view that it is not.

4. SAME—PENDENCY OF PROCEEDINGS—JURISDICTION OF PROPERTY.

Where the record in bankruptcy proceedings in a federal court showed that they were still pending on an application for the confirmation of the sale of the assigned property, a grantee of the property from the bankrupt could not assert title against the assignee's grantee in a suit to quiet title in a state court, since, even if the latter acquired no title, the property was in the control of the federal court.

5. SAME—MINISTERIAL OFFICER—DEEDS—LIMITATIONS.

An assignee in bankruptcy, appointed by a United States district court for Michigan, is a "ministerial officer of a court of competent jurisdiction within this State," within 3 How. Stat. § 8698, subd. 1, barring a right of entry, after the lapse of five years, against one occupying land under a deed from such an officer.

6. SAME—QUIETING TITLE—PLEADING.

Where, on a bill to quiet title against a grantee from an assignee in bankruptcy, the answer alleged facts showing that defendant had been in possession for five years, it was sufficient to raise the question of such limitation, though it did not in terms plead 3 How. Stat. § 8698, subd. 1, by which such limitation is imposed.

Appeal from Berrien; Coolidge, J. Submitted November 15, 1899. Decided December 30, 1899.

Bill by Sophronia Potter against John F. Martin and others to quiet title. From a decree for defendants upon their cross-bill, complainant appeals. Affirmed.

M. L. Howell and *Edward Bacon*, for complainant.

N. A. Hamilton, for defendants.

HOOKE, J. This is a bill to quiet title to land. The parties complainant and defendant derive title to the *locus in quo* from a common source, viz., Benjamin C. Hoyt, complainant's father. The defendants' title is prior in point of time, being derived through an assignee in bankruptcy, under federal law, by deed dated January 10, 1881. The complainant's title consists of a quitclaim deed from her father, dated April 16, 1891; and this deed undoubtedly conveyed to her whatever interest he had at that time, and no more. Her right to relief must therefore depend on—*First*, proof of her possession when the bill was filed; *second*, the invalidity of the defendants' alleged title. The learned circuit judge who heard the case decided against her upon both points. In the matter of possession, we think that she has failed to show the requisite occupancy. The defendants fenced the lot, and used it for such purposes as vacant lots are used for several years. She sought to show an interruption of this, and that she took and retained possession for a time before filing her bill. We are of the opinion that her acts amounted to no more than a trespass, and that she cannot be said to have been in possession.

Benjamin C. Hoyt and his son were made defendants in bankruptcy proceedings upon the application of one Whittlesey, a creditor, filed October 10, 1873. Benjamin C. Hoyt, the survivor, was duly adjudicated bankrupt on June 1, 1874, and this was recognized by the Supreme Court of the United States in *Chapman v. Brewer*, 114

U. S. 158. The land in controversy was deeded to the defendants' grantor by the assignee under an order of the court. Three points are made against the validity of this deed:

1. That the assignee did not acquire title, for the reason that, before the court acquired jurisdiction of the lands, Hoyt deeded them to one Collins.
2. That the sale and deed were made by the assignee some six years after the order of sale.
3. That the sale was never confirmed.

We will examine these claims in their order.

Hoyt and his son were in partnership, and, finding themselves in failing circumstances, had negotiations with some of their creditors, with a view to avoiding proceedings in a court of bankruptcy. Whittlesey, one of their creditors, appears to have preferred judicial proceedings; for on October 10, 1873, he filed his petition in bankruptcy in the district court at Grand Rapids. Subsequently, and on January 20, 1874, Hoyt deeded the land to Collins in trust, to be applied to the payment of debts in conformity to the mode pointed out by the federal bankruptcy law. Soon after, and on January 29, 1874, another creditor, Moynahan, filed another petition in bankruptcy. Exceptions were filed on behalf of Hoyt & Son to the Whittlesey petition. The date that these were filed does not appear, but it does appear that on February 24, 1874, it was adjudicated that the exceptions were well taken, and 15 days were given to the petitioner within which to amend the petition; and it was further ordered that whereas Hannah Moynahan had filed a further petition of like character, to which the respondents had appeared and filed denial, and demanded trial by jury, the case should be adjourned into term for hearing. March 5, 1874, Whittlesey filed an amended petition. June 1, 1874, Enoch C. Hoyt, the son and partner, having died, and his death having been suggested upon the record, Benjamin C. Hoyt withdrew his denial, and there was an adjudication in bankruptcy against him, and a reference to the register in bankruptcy.

October 1, 1874, the register made the ordinary general assignment to Brewer, the assignee. November 4, 1874, the court made an order of sale. December 5, 1874, Brewer filed an inventory; and on December 10, 1878, a *nunc pro tunc* order was made, by consent, that the record, which showed that the adjudication was upon the petition of Moynahan, should be changed and made to appear, as was the fact, that it was upon the petition of Whittlesey. December 31, 1880, Collins made an ordinary quitclaim deed to Brewer, as assignee in bankruptcy, of the property which had been deeded to him in trust. January 5, 1881, Brewer, claiming to act under the order of sale, sold at public sale, and on January 10th deeded to John Martin, the land in controversy in this suit, and the deed was recorded on January 18, 1881. Brewer died in March, 1889.

April 16, 1891, the quitclaim deed was made to complainant. December 18, 1891, Benjamin C. Hoyt filed a petition alleging the previous existence of the partnership; its embarrassment; a meeting of creditors, at which nearly all signed releases, agreeing to make their claims under the deed to Collins, to avoid the loss by bankruptcy proceedings; the giving of such deed; Whittlesey's petition, erroneously alleged to have been filed after the Collins deed was made, and the allegation that said petition was void on its face; the removal of Benjamin C. Hoyt to Mississippi in the belief that Collins would be faithful to his trust; that in June, 1889, petitioner returned to Michigan, and had investigated the manner, extent, and result of the disposal of his estate, and that it appeared to have been sold by Brewer as assignee, and that he executed and delivered deeds that purport to convey only such title as petitioner had at the time of the assignment in bankruptcy, and that Collins still held title until after said sales and deeds were made, when he conveyed by quitclaim to the assignee; that the Collins deed was considered an outstanding title by the purchasers, who were some of petitioner's creditors. It prayed a review of the proceedings,

and, in short, such relief as the inquiry might show petitioner entitled to, if it should appear that the petitioner's estate was under the jurisdiction and control of the court.

On December 15, 1893, John F. Gard was appointed assignee in place of Brewer, deceased. March 12, 1895, an order was filed reciting a petition filed by Gard, assignee in bankruptcy, praying a confirmation of the sales by Brewer, an answer filed by Hoyt, and a replication, and directing proofs to be taken. On March 29, 1898, the clerk of said court, by a certificate, showed that the proceedings were still pending, and said order to take proofs was the last proceeding therein

The first question seems to be answered by the decision of the Supreme Court of the United States in the case cited, which held that "the assignment, when made, related back to October 10, 1873, and vested title in the assignee as of that date," and "that the adjudication was regular and valid, and refers to and was made on the first petition as amended by the second, and on a proceeding commenced when the first petition was filed." This decision was upon a bill filed by the assignee against execution creditors, who attached the property before anything was done upon the first Whittlesey petition. The proceedings show that the Whittlesey petition first filed was not treated as void; being amended by leave of court, and made the foundation of the proceedings. Hoyt withdrew his denial, and Collins deeded to the assignee,—an unnecessary act, as the deed to him could not stand against the assignee.

We see no reason for saying that the sale by the assignee was invalid because not made at once after the order was made. As late as 1885 the proceedings were treated as valid by the appellate court, and in 1895 an application to confirm was filed, and order of hearing made. No authorities are cited in support of the proposition that mere inaction ousts such a court of its jurisdiction.

The learned circuit judge who heard this cause was of the opinion that no order of confirmation was essential. The case of *In re O'Fallon*, 2 Dill. 548, is cited as indica-

tive of the existence of the practice of confirming such sales, but it is not clear that the case goes further than to vindicate the power of the court to order a resale for inadequacy of price. Section 4 of the bankruptcy act (18 U. S. Stat. at Large, chap. 390) provides that the court, *on application of any party in interest*, shall have complete supervisory power over such sales, including *the power to set aside the same and to order a resale*, etc. This would seem to imply that the sale should stand unless *some interested party should move to vacate it*. This may have been the practice followed in the *O'Fallon Case*, as it certainly was in the case of *In re Troy Woolen Co.*, 8 Blatchf. 465. In *Re Alden*, 16 N. B. R. 39, the question was raised, and the court held that confirmation would not be made, but the purchaser would be left to establish his title when occasion should arise; citing *Donnel's Case*, Fed. Cas. No. 3986a. We incline to the view taken by the circuit judge. But, as the record shows that the proceedings are yet pending upon a petition for confirmation, the complainant has no right to assert her title against that of the assignee or his grantee. If the deed did not vest the purchaser with title, the property is still in the control of the federal court. *Oliver v. Sanborn*, 60 Mich. 356.

If it could be held that the federal court has no longer jurisdiction, another answer to the complainant would be found in defendants' possession, which, under subdivision 1, § 8698, 3 How. Stat., bars a right of entry, after the lapse of five years, against one occupying under a deed from a ministerial officer of a court of competent jurisdiction within this State. The district court of the United States for the Western district of Michigan is such a court, and an assignee in bankruptcy is such an officer. It is said that the answer does not raise this question. It is true that it does not in terms plead the particular statute, but that is unnecessary. The answer alleges facts which sustain its claim of possession.

The decree is affirmed, with costs.

The other Justices concurred.

FULLER v. LOCOMOTIVE ENGINEERS' MUTUAL LIFE & ACCIDENT INSURANCE ASSOCIATION.

MUTUAL BENEFIT ASSOCIATIONS—ACCIDENT INDEMNITY—AMPUTATIONS—LOSS OF FOOT.

A by-law of a mutual benefit association, providing that any member receiving bodily injuries which alone shall "cause amputation of a limb (whole hand or foot)" shall be entitled to certain benefits, does not cover the case of an amputation of only a part of a foot, though the foot is rendered useless for the performance of its natural functions.

Error to St. Clair; Vance, J. Submitted November 15, 1899. Decided December 30, 1899.

Assumpsit by William L. Fuller against the Locomotive Engineers' Mutual Life & Accident Insurance Association on a policy of insurance. From a judgment for defendant on verdict directed by the court, plaintiff brings error. Affirmed.

John B. McIlwain, for appellant.

Phillips & Jenks, for appellee.

HOOKEK, J. The plaintiff was a member of a mutual benefit association, and held a certificate which he claims to entitle him to payment of \$3,000 under article 19 of the by-laws, which is as follows:

"Any member, while engaged in any lawful avocation, receiving bodily injuries which alone shall cause amputation of a limb (whole hand or foot), or total and permanent loss of eyesight, he shall receive the full amount of his policy."

The defendant refuses payment upon the ground that the injury sustained does not bring him within the by-law, for the reason that the injury did not cause amputation of

a whole hand or foot. The circuit judge directed a verdict for the defendant, and the plaintiff has appealed.

The record contains diagrams showing the size and shape of the whole left foot and the maimed right foot. They were made by drawing a pencil around them while the plaintiff stood upon a piece of paper. The length of the whole foot is 11 5-16 inches to the end of the great toe, while the amputated foot is exactly $7\frac{1}{2}$ inches on a line drawn through the center of the foot, and $7\frac{3}{4}$ inches if drawn in the direction of the great toe. It is thus demonstrated that the foot is shortened 3 13-16 inches, which is as nearly one-third as it well could be. This one-third is from the toe, and it leaves two-thirds of the foot. This would leave all of the heel, and substantially all of the hollow of the foot, and possibly a part of what is called the "ball" of the foot. We do not overlook the statement that the skin of the sole was left longer to lap upward over the end, and perhaps part of the top, of the mutilated foot, but this cannot have lengthened it materially. It is claimed that it would be 1 inch. Counsel claims that the proof shows that all use of the foot is lost, and insists that this brings him within the spirit and meaning of the contract. He contends: *First*, that the contract should be read as though it said, "Foot or whole hand,"—in other words, that the qualifying adjective, "whole," should not be applied to "foot;" and, *second*, that, in any event, the whole foot was amputated when it was so far removed as to be useless in the performance of the natural functions of a foot.

The natural construction of the words would be the same as though the by-law had said, "Whole hand or whole foot." Furthermore, the injury insured against is not the amputation of a hand or foot, but a limb; and the words in brackets, "whole hand or foot," are used as explanatory of what was meant by the word "limb," *i. e.*, an amputation, not necessarily a whole arm or leg, at the elbow or knee, but any amputation of a limb that should include a whole hand or a whole foot.

We are cited upon the second proposition to some authorities which are said to hold that, if the beneficial use of a member is lost, there may be a recovery. That would be a reasonable construction of a contract of insurance that should insure against the "loss of a hand or foot," for it might well be said that a foot or hand is lost when it is so impaired as to be of no further use; and that is as far as the authorities have gone. What is meant by the loss of a hand? Ordinarily the term "loss" is obvious, but when it is considered in the light of surrounding circumstances, viz., an insurance policy that indemnifies against the loss of a hand or an entire hand, it is not unreasonable to hold that the parties understood that any injury to the hand which rendered it useless was a loss of the hand or entire hand. In *Sheanon v. Insurance Co.*, 77 Wis. 618 (9 L. R. A. 685, 20 Am. St. Rep. 151), where "an insurance policy provided that the principal sum should be paid if the insured, from a violent and accidental injury which should be externally visible, should 'suffer the loss of the entire sight of both eyes, or the loss of two entire hands or two entire feet, or one entire hand and one entire foot,' the insured was accidentally shot in the back; the bullet penetrating his spine, and producing immediate and total paralysis of the lower part of his body, and entirely destroying the use of both feet. Held, that he had suffered 'the loss of two entire feet,' within the meaning of the policy."

The court said:

"The question is, Does the policy cover such an injury? The policy covers both death and indemnity; the company agreeing to pay the principal sum if the insured, from a violent and accidental injury which should be externally visible, should 'suffer the loss of the entire sight of both eyes, or the loss of two entire hands or two entire feet, or one entire hand and one entire foot.' This is the language of the policy, and the question is, What does it mean, or what must be understood by it? Is its meaning that the insured is not entitled to recover the insurance money unless his legs and feet have been amputated or severed from his body, or does it mean that the injury

must have destroyed the entire use of his legs and feet, so that they will perform no function whatever? The contention of the learned counsel for the defendant is that the clause is to be understood in the former sense, and implies an amputation or physical severance of the feet from the body, and does not include an injury such as paralysis, though such injury actually deprives the insured of all use of his feet and legs. We cannot adopt such a construction of the contract. To our minds, the loss of the hands and feet embraced in the policy is an actual and entire loss of their use as members of the body; and if their use is actually destroyed, so that they will perform no function whatever, then they are lost as hands and feet. In ordinary and popular parlance, when a person is deprived of the use of a limb we say he has lost it. This is the ordinary sense attached to the word when used in such a connection. Now, if the feet and hands cannot be used for the purpose of moving about or walking, or for holding and handling things, they are in fact lost as much as though actually severed from the body. The expression 'loss of feet' would generally be understood to mean a loss of the use of these members; and if the lower portions of the plaintiff's body and his feet are completely paralyzed, and he is permanently and forever deprived of their use, he has suffered 'a loss of two entire feet,' within the meaning of the policy."

The next case in chronological order to which our attention is called is *Stevens v. Insurance Ass'n*, 150 Pa. St. 132 (16 L. R. A. 446). There it was held that:

"An accident policy insuring against involuntary, external, violent, and accidental injuries, and not against disease of any kind, or against disabilities which are the result, wholly or in part, of disease or bodily infirmities, and providing for a stipulated indemnity for partial permanent disablement, which is defined to be the loss of one hand or foot or both eyes, does not cover the case of indemnity for an injury where the foot is not lost or injured, and it may be used constantly by means of an appliance of a plaster jacket to the spine, although the foot could not be used if the appliance were removed."

It was held that he had lost neither the foot nor the use of it.

The case of *Sneck v. Insurance Co.* is next in order of

time. This case was tried twice, and is reported in 81 Hun, 331, and 88 Hun, 94. The undertaking in that case was based upon "a loss by severance of one entire hand or foot." At the first review the court held that it was error to submit the case to the jury where the proof showed that the hand was removed a short distance back of the knuckle. Bradley, J., dissented; urging that the policy insured against *loss* of the hand, and that, it being shown that the *entire use* of the hand *was lost*, there might be a recovery. Upon the second hearing this view was taken; Werner and Ward, JJ., sustaining it; Lewis, J., dissenting; and Bradley, J., not voting; and this order was afterwards affirmed by the court of appeals in 156 N. Y. 669.

Again, in *Lord v. Accident Ass'n*, 89 Wis. 19 (26 L. R. A. 741, 46 Am. St. Rep. 815), it was held that "it is for the jury to determine whether a total loss of three fingers and a part of another on the same hand, destruction of the joint of the thumb, and a cutting of the hand, is a loss of the hand, 'causing immediate, continuous, and total disability,' within the meaning of that clause in a policy of accident insurance."

A number of cases are collected in a note to *Turner v. Casualty Co.*, 38 L. R. A. 535, 536 (112 Mich. 425).

In 1 Am. & Eng. Enc. Law (2d Ed.), 301, this subject is summed up as follows:

"It has been contended on behalf of the insurance companies that the provisions in regard to the 'loss' of the hands and feet must be understood to imply an actual amputation or physical severance of those members from the body. But this view has not met with favor from the courts; it being held that, to entitle the insured to recover, physical severance is unnecessary, but it is sufficient if he has been deprived entirely of the use of the feet and hands as members of the body. And there can scarcely be any doubt as to the soundness of this view, for if the feet and hands cannot be used for the purpose of moving about or walking, or for holding and handling things, they are in fact lost as much as though actually severed from the body. Many of the companies have altered their policies

so as to read, 'The loss of feet or hands by severance' thereof; but this provision has been held to be intended to refer to the manner, rather than to the exact physical extent, of the injury."

These cases establish the proposition that where an insurance policy insures against the loss of a member, or the loss of an entire member, the word "loss" should be construed to mean the destruction of the usefulness of the member, or the entire member, for the purposes to which, in its normal condition, it was susceptible of application. In all of these policies the word "loss" is used, and it is the loss of the member that is in terms insured against. As indicated in the last authority cited, the attempts of the insurance companies to avoid this construction by so changing the policy that it reads, "Loss by severance of feet or hands," have failed; the courts holding, as before, that it is the loss of the use of the member which was the object of the contract. In the present case the word "loss" is eliminated, and the insurance is against "an *injury* that shall cause the amputation of a limb (whole hand or foot), or total and permanent loss of eyesight." This language is not ambiguous, and, if the insurance company intended to limit its liability to cases where the entire member was actually amputated, it could not well have chosen more apt and certain language to indicate it, without supplementing it with a negative statement that should exclude recovery for the amputation of less than the entire foot or hand; and it is doubtful if that would not be open to the same construction as the language actually used. This company is composed of the insured. They make contracts of insurance which protect against certain injuries merely. It is not for us to make contracts for them, nor should we enlarge their liabilities. We may determine the intention of the contracting parties as disclosed by the contract, if it is ambiguous, or in the light of the circumstances under which it was made, if it is fairly susceptible of a different meaning from that natur-

ally implied by the unexplained use of the words. This is neither.

The instruction of the learned circuit judge was correct, and the judgment is affirmed.

The other Justices concurred.

CHURCH v. CASE.

1. PUBLIC LANDS—GRANTS—UNMEANDERED LAKE—ISLANDS—TITLE.

A government patent, without reservation, of the land bordering on an unmeandered lake, vests in the patentee the title to an unsurveyed island in the lake, which cannot be affected by the action of the government in subsequently causing the island to be surveyed and offered for sale through the regular channels.

2. SAME—ESTOPPEL.

The fact that a person in possession of land, claiming to be the owner, applied to the government to have the same surveyed and offered for sale, will not estop him from disputing the title of a purchaser at such sale, where he notified such purchaser, before the sale, that he was the owner and would contest the sale.

Error to Genesee; Wisner, J. Submitted November 15, 1899. Decided December 30, 1899.

Ejectment by Frank E. Church against Evington W., Charles E., and Emily E. Case. From a judgment for defendants on verdict directed by the court, plaintiff brings error. Affirmed.

E. C. Chapin, for appellant.

Clarence Tinker and Frank E. Jones, for appellees.

MONTGOMERY, J. This is an action of ejectment to

recover an island situated in Long Lake, Genesee county, containing about 18 acres. In the original survey of the township in which this island is situated, no island is shown. The lands adjacent to the lake are surveyed with lines extended to the shore in the usual way. The lake is not meandered. The evidence shows that patents were issued by the government many years ago conveying different descriptions of land bordering on the lake, and all the descriptions which would include the island within the extended lines. The record is silent as to other descriptions abutting on the lake. The defendants and their grantors have been in possession and claiming title nearly 40 years, and, as against the patentees of most of the land adjoining the lake, have acquired title by adverse possession. If the grant by the government of the surveyed land adjoining the lake conveyed the title to the island in question, the plaintiff has shown no right to recover, unless the defendants are estopped,—a claim which will be referred to later.

It is not necessary to determine the rights of the various riparian proprietors as between themselves, or the method to be adopted in extending their lines. The question is, Did the conveyance of the land adjoining the lake pass title to the purchasers to this island? We think such was the effect of the patents. When they were made there was nothing which indicated to purchasers any intention of reserving this island from the conveyance. *Butler v. Railroad Co.*, 85 Mich. 246 (24 Am. St. Rep. 84); *Clute v. Fisher*, 65 Mich. 48; *Goff v. Cougle*, 118 Mich. 307 (42 L. R. A. 161); *Webber v. Boom Co.*, 62 Mich. 626; *Chandos v. Mack*, 77 Wis. 573 (20 Am. St. Rep. 139). Many years after the patents were issued, the secretary of the interior caused a survey of the island to be made, and it was offered for sale through the regular channels. The title having previously passed out of the government, the purchaser under such sale could acquire no title as against the earlier patentees. *Webber v. Boom Co.*, *supra*.

The evidence shows that Timothy B. Case, late husband

of defendant Emily, and father of the other defendants, applied to have this land surveyed and offered for sale; and it is claimed that his representatives should be estopped from disputing the title of the purchaser. It appears, however, that before the sale was made to plaintiff, who became the purchaser, the plaintiff was notified by Mr. Case that he was the owner and would contest the sale. This notice was sufficient to remove one essential element of an estoppel. The plaintiff could not have relied on the previous representations or acts of Case in making the purchase.

The court properly directed a verdict for defendants. Judgment affirmed.

GRANT, C. J., HOOKER and MOORE, JJ., concurred. LONG, J., did not sit.

FIELD *v.* MAGEE.

122	556
124	862
122	556
881W	354
122	556
136	112

1. LIBEL—BRIBERY OF ELECTORS.

A publication, made pending an election, imputing to plaintiff the remark that there was not one of a certain class of voters in his county who could not be bought for a two-dollar bill, and stating that he was one of the ring's chief heelers, and that such remark indicated how the ring intended to carry the fall election, is libelous *per se*, as holding plaintiff up to public hatred and contempt, and charging him with the purpose of committing bribery.

2. TRIAL—EVIDENCE—OBJECTIONS.

An objection to the admission of evidence will not be considered on appeal, where the charge of the court practically withdrew such evidence from the consideration of the jury, and the verdict shows that they were not prejudiced by it.

3. SAME—WAIVER OF ERROR.

A party cannot complain of the exclusion of certain evidence,

where the court afterwards intimated to him that he would consider a new offer of such testimony, and he failed to renew the offer.

4. LIBEL — VERDICT — SPECIFICATION OF DAMAGES — FAILURE TO REQUEST INSTRUCTIONS.

Defendant in an action for libel cannot complain that the court failed to instruct the jury to specify in their verdict separately, as required by 8 Comp. Laws 1897, § 10424, the amount awarded for damages to feelings and the amount awarded for other damages, where no request was made for such instruction.

Error to Chippewa; Steere, J. Submitted November 17, 1899. Decided December 30, 1899.

Case by Nathaniel L. Field against Michael J. Magee for libel. From a judgment for plaintiff, defendant brings error. Affirmed.

John W. Shine (A. B. Davidson, of counsel), for appellant.

Warner & Sullivan, for appellee.

MONTGOMERY, J. This is an action of libel. The publication complained of was the following:

“SLANDERED THE FRENCH.

“The Democrat takes exception to a remark attributed to Postmaster Field, of Rudyard, who is known as one of the ring’s chief heelers. The political situation was being discussed by Mr. Field and another heeler, when the latter remarked that, owing to so many French settlers coming into Rudyard, the township would probably go Democratic this fall. ‘Oh, to h——l with the French!’ Field remarked; ‘there is not one of them in the county that cannot be bought for a two-dollar bill.’ This was a slanderous statement, and will no doubt be resented by our French voters to a man. The remark is indicative, however, as to how the ring expects to carry the election this fall.”

The plaintiff recovered a verdict of \$100, upon which judgment was entered, and defendant brings error.

A large number of assignments of error are intended to raise the question of whether the article is libelous *per se*. It was alleged as matter of inducement, and proved on the trial, that an election was pending and soon to take place when this article was published. The statement imputed to plaintiff, that "there is not one of them in the county that cannot be bought for a two-dollar bill," when coupled with the statement that plaintiff "is known as one of the ring's chief heelers," and the further statement that "the remark is indicative as to how the ring expects to carry the election this fall," leaves nothing further to be supplied by proof. This publication was not only intended to hold the plaintiff up to public hatred and contempt, but plainly charged him with the purpose of committing the offense of bribery. The article was libelous *per se*. See *Randall v. Evening News Ass'n*, 79 Mich. 266 (7 L. R. A. 309); *Belknap v. Ball*, 83 Mich. 583 (11 L. R. A. 72, 21 Am. St. Rep. 622).

The declaration averred that numbers of the citizens of French nationality who had been accustomed to trade with the plaintiff at his store ceased to do so in consequence of the publication of the libel. The defendant demanded a bill of particulars. One was furnished. Defendant thereupon made a motion for a specific bill of particulars, which motion was denied. On the trial, objection was made to evidence as to loss of trade on the ground that the names of the customers had not been given, which objection was overruled. We think it unimportant to determine whether this evidence was competent under the pleadings, as the court later in the case instructed the jury that no damages could be awarded for loss of trade, as there was no specific *data* before the jury upon which they could base any verdict in that particular, thus excluding all such evidence from the consideration of the jury. The admission of the evidence could not have prejudiced the jury, as sufficiently appears by the verdict.

One Senogles was a witness for defendant to prove that the words imputed by the article to the plaintiff were

uttered by him. On cross-examination he testified that he had had some trouble with plaintiff. He also testified that he first told of the conversation to Mr. Magee, and fixed the date as shortly before the trial, and after the trouble between the witness and plaintiff. On re-examination the witness was asked if he had had a talk with one Wyatt about the remark plaintiff is claimed to have made. He answered in the negative. Defendant called Wyatt to the stand, and asked him if he had a talk with Mr. Senogles, prior to the trouble between plaintiff and Senogles, relative to the remark now alleged to have been made by plaintiff. This testimony was ruled out. It is now urged that it was competent to make proof of the fact that, before the trouble arose between the parties, the witness had made the same statement to others, for the purpose of negating any inference that the statement was prompted by motives of revenge. There is authority which supports the admissibility of this testimony in certain cases. 10 Enc. Pl. & Prac. 331. Such testimony is admitted, however, in corroboration of the witness, and not in any case as affirmative evidence. It is difficult to ascribe to the offered testimony the character of corroboration, when it is considered that the witness Senogles denied having the conversation with Wyatt. However this may be, we think a clear intimation was thereafter given by the circuit judge that he would consider a new offer of this testimony, and no such offer was made. In fairness to the trial judge, the offer should have been renewed. We think the defendant is not in position to complain of this ruling.

The verdict did not specify separately the damages suffered to plaintiff's business, occupation, etc., and those arising from injury to his feelings. Neither party requested that the verdict be so taken, and the court, as before stated, excluded all damages in respect to plaintiff's business. The question is ruled by *McGee v. Baumgartner*, 121 Mich. 287.

The other questions raised have been considered, and no error is discovered.

Judgment affirmed, with costs.

The other Justices concurred.

ROBERTS v. KALAMAZOO CIRCUIT JUDGE.

MANDAMUS—POSTPONEMENT OF FORECLOSURE SALE.

Mandamus was granted requiring the circuit judge to postpone a sale of property under a decree of foreclosure until the expiration of a year from the time of the appearance of certain of the defendants not served with process, it appearing that, owing to the pendency of certain suits affecting the property, it could not be sold to advantage at the earlier date fixed by the court.

Mandamus by Charles E. Roberts to compel George M. Buck, circuit judge of Kalamazoo county, to postpone a foreclosure sale. Submitted December 12, 1899. Writ granted December 30, 1899.

One Malcolm B. Williams, trustee, filed a bill of foreclosure against the Kalamazoo Heat, Light & Power Company and others in July, 1898. Four of the defendants were not served with any notice, and did not appear until March 28, 1899. A decree of foreclosure was entered on June 26, 1899, authorizing the circuit court commissioner to make sale at any time after the 1st day of August, 1899. The relator is interested in the first mortgage, and also in a subsequent mortgage. The interests involved are large. A suit is now pending in this court involving the validity of the franchise of the defendant company, and is on the docket for the present term. A mechanic's lien suit is also pending in the court below.

The sale was advertised for November 22, 1899. On November 14th relator filed a petition in the circuit court in the cause, alleging the facts, and the injustice in now making a sale, and claiming, also, that the sale would be illegal, for the reason that a year had not yet elapsed from the time a part of the defendants were served with notice and appeared in the case. The motion was denied, and the relator now asks for the writ of *mandamus* to issue out of this court to compel the postponement of the sale.

E. A. & Robert B. Crane, for relator.

Osborn, Mills & Master, for respondent.

PER CURIAM. We deem it unnecessary to determine the question of the right to sell at the time specified. The court below had discretion to postpone the sale, and, we think, should have done so, since it is apparent that the property cannot now sell to advantage until the suits above mentioned are disposed of. See *Detroit Fire & Marine Ins. Co. v. Renz*, 33 Mich. 298. The writ will issue, directing the court below to postpone the sale until March, 1900.

122 MICH.—36.

JANUARY TERM, 1900.

PEOPLE v. LUTTERMOSER.

1. FALSE PRETENSES—INFORMATION—AVERMENTS.

An information for obtaining money by false pretenses shows a natural connection between the false pretenses and the obtaining of the money, where it alleges that respondent fraudulently obtained orders for greater amounts than due, and then presented the orders and obtained the money thereon, though the orders were payable to third persons, and it is not averred how they came to respondent.

2. SAME—DUPLICITY.

The gist of the offense charged by an information being the obtaining of money by the presentation of false orders, and the averment as to obtaining the money being single, there is no duplicity because of averments as to false pretenses by which the persons were induced to sign the several orders.

3. SAME—MOVING CAUSE.

Upon the prosecution of a member of a township board for obtaining money from the township upon orders which he induced his associates to sign for more than the amounts due, an instruction is not erroneous which permits a conviction if the jury should find that the fraudulent orders would not have been issued but for respondent's wrongful act, though they may also find that the other members of the board, in signing the orders, acted to some extent upon a hasty examination of their own, and not altogether in reliance upon respondent.

4. SAME—WHAT CONSTITUTES A PRETENSE.

The presentation of orders for the payment of money by one who fraudulently procured them to be issued for more than the amounts due is a pretense, within the statute (3 Comp. Laws 1897, § 11575) prescribing a punishment for obtaining money by false pretenses.

Exceptions before judgment from Wayne; Hosmer, J.
Submitted June 22, 1899. Decided January 23, 1900.

Otto L. Luttermoser was convicted of obtaining money by false pretenses. Affirmed.

R. I. Lawson, D. B. Hayes, and Alfred Lucking, for appellant.

Allan H. Frazer, Prosecuting Attorney, and *Ormond F. Hunt*, Assistant Prosecuting Attorney, for the people.

MONTGOMERY, C. J. The information in this case charges, in substance, that the respondent was on June 7, 1897, a justice of the peace of the township of Springwells, and a member of the township board; that Christian D. Roeser was supervisor, and Charles Warncke was clerk; that on the date aforesaid, at a meeting of the board, there were before the board certain bills of certain claimants for work upon the highways of district No. 1 of said township, of which said district the said Luttermoser was a resident; that on said date, and at the place of said meeting, said Luttermoser took the order book of the clerk of the township, containing stubs and corresponding blank orders used for the payment of claims out of the highway funds of said township and district, and the said several bills of claimants, and then and there pretended and assumed to write out orders for the payment of the money of the several claimants in district No. 1 as shown by the bills before him, ready for the signatures of the clerk and supervisor, and to properly make out the several stubs connected therewith; that said Luttermoser correctly wrote the amount of the bill of Aug. Tabert (order No. 167), in the stub thereof, for the sum of \$3.75, which said sum of \$3.75 was the entire amount then and there due to said Tabert from the township of Springwells, but falsely, deceitfully, and fraudulently wrote in the order itself the sum of \$13.75. The information avers like facts and acts of respondent as to three other orders, and alleges that the respondent did designedly and fraudulently cause these orders to be signed by the supervisor and clerk. The orders are set out, and are payable to the respective

persons named as having claims against the township. The information further charges:

“And that thereafter the said Otto L. Luttermoser indorsed his name upon the back of each and every of said orders, and fraudulently presented the same to the treasurer of the township of Springwells, and received the money, according to the face of said several orders above set forth, out of the funds of said township; that the bill of Aug. Tabert, John Kunkel, Sam Gove, and Aug. Pries, then in the hands of Otto L. Luttermoser at the time he wrote the orders and stubs above set forth, was in each case for the amount of three and 75-100 dollars, which sum in fact was actually owing to the said several parties, and which the said Otto L. Luttermoser then and there well knew; that the said Otto L. Luttermoser, by assuming and pretending to correctly copy the amounts of said several bills of claimants into the said several orders in payment therefor, induced the board to believe that the correct amount was written in the body of the orders, and knowingly, falsely, and fraudulently induced the said supervisor and clerk to sign and countersign the said orders, and by means of said false pretenses aforesaid the said Luttermoser did thereafter obtain the money represented by the said several orders from the treasurer of the said township of Springwells, out of the funds of said township, with the intent to cheat and defraud the said township of Springwells. And the said Christian D. Roeser, supervisor, and the said Charles Warncke, clerk, relying upon and believing the fact to be that the said Luttermoser had written in the body of said orders the same amount as shown by the several bills, respectively, and being induced so to do by the false and fraudulent pretenses and representations of the said Luttermoser aforesaid, were deceived thereby, and respectively signed and countersigned the said orders; and the said Otto L. Luttermoser, by reason of the false pretenses as aforesaid, did designedly obtain possession of the said orders, and thereafter the money represented by and according to the face of said several orders, from the treasurer of the said township of Springwells, out of the funds of the said township, with the intent to cheat and defraud the said township of Springwells.”

The information further proceeds to negative the truth that the township was indebted to the various parties in

the sum stated in the orders, and avers that the indebtedness was only \$3.75 in each case.

1. It is contended that the information is fatally defective for the reason that no natural connection is shown between the false pretenses and the obtaining of the money. The fact that the respondent made use of these orders to obtain the money of the township to the amount represented by the orders, from the township treasurer, is averred. We think this makes the connection. It shows that in fact the orders were used as instrumentalities to obtain money fraudulently, and with intent to cheat and defraud the township.

2. It is next urged that the information is bad for duplicity, in that it charges two offenses,—the one, obtaining the signatures of the clerk and supervisor to a written instrument by false pretenses, under section 11575, 3 Comp. Laws 1897; and the other, obtaining the money of the township by false pretenses, an offense punishable under the same statute. The nature of the offense makes it necessary to set out the nature of the false tokens and pretenses. The obtaining of the signatures and the presentation of the orders constituted the false pretenses to the treasurer which induced him to part with the money of the township. Possibly the facts were set out in greater detail than was absolutely necessary, but this was not a fault. The gist of the offense was the obtaining the money by the presentation of false or invalid orders. When this is stated, it answers the further objection that the information is bad for duplicity because in the same count several distinct, petty offenses are alleged, as these supposed distinct offenses consist of obtaining these several orders, but the averment as to obtaining the money is single.

3. It is contended that the evidence shows that the false pretenses were not relied upon. It is sufficient to say that we do not read the testimony as by any means conclusively showing any such thing. On the contrary, there is enough in the very circumstances of the case to justify the inference which the jury drew.

4. The court charged, on request of the respondent, as follows: "If you believe the testimony of Warncke, that he signed the orders because of his own investigation, and not because of anything Luttermoser said or did, then your verdict must be, 'Not guilty,'"—adding, "As an abstract proposition of law, gentlemen of the jury, I think that is so, but I shall say something hereafter in qualification of that request." And he later charged:

"In other words, if you should find that Mr. Warncke and Mr. Roeser knew of the invalidity of those orders, if you should find them invalid,—knew what Mr. Luttermoser had done in that regard,—then, under those circumstances, obviously there could be no conviction, because they would not have been moved by what he did. But all I meant to say in that regard was this: That because they say they did not necessarily rely upon what he had done, but made an examination, or something of an examination, for themselves, or at least one of them, or relied upon somebody else having checked them over, still I say that if you find with reference to this matter that, after all, the real cause of this matter was the fraud of Mr. Luttermoser, then, and under those circumstances, I should say it was the moving cause, and the false pretenses in that regard, so far as the issuance of the orders, had been established."

This instruction is assigned as error. We think it fully justified. Under this instruction, before the jury could find the respondent guilty, they must have found that the orders falsely representing an amount greater than the sums due the respective claimants would not have been issued except for the wrongful act of the respondent, and hence that the instrumentalities which enabled him to obtain the money from the township treasurer would have had no existence. We repeat, the gist of the offense was obtaining the money.

5. It is contended that, in order to warrant a conviction, there must be some active, direct pretense. The presentation of the orders, known to be fraudulent, and procured as these were, was a pretense. 1 McClain, Cr. Law, § 674. See, also, *Com. v. Mulrey*, 170 Mass. 103.

We have confined ourselves to the questions discussed in the brief of respondent's counsel, and have not considered other assignments of error. We do not think there was error in respect to these matters discussed.

The conviction will be affirmed, and the case remanded.

The other Justices concurred.

HALLETT v. GORDON.

1. CONTRACTS—JOINT UNDERTAKING—ACTIONS—PARTIES.

Where two persons jointly contract with a third, both are necessary parties to an action on the contract against him.

2. SAME—BREACH OF WARRANTY—PRINCIPAL AND AGENT.

Plaintiff, a married woman, brought suit against defendant for a breach of warranty in the matter of a sale of lands. It appeared that the lands were owned by a third person, in whose behalf defendant signed a land contract running to plaintiff and her husband. *Held*, that the facts did not necessarily establish a misjoinder or a fatal nonjoinder of parties, as plaintiff's husband might have been named in the instrument merely as an incident to the contract between his wife and defendant, and the latter, in making the deal, may have bound himself, relying upon his ability to secure ratification by the owner.

3. SAME—WRITTEN EVIDENCE—MODIFICATION BY PAROL.

A contract of sale as evidenced by unambiguous writings cannot be modified by parol proof of a warranty.

4. SAME—SALE OF LAND—STATUTE OF FRAUDS—PART PERFORMANCE.

Part performance of a contract for the sale of land, invalid because not in writing, does not make it valid, so as to permit an action at law for its breach.

ON REHEARING.

ACTIONS—ASSUMPSIT—FRAUD AND DECEIT—PRINCIPAL AND AGENT

Under 3 Comp. Laws 1897, § 10421, providing that in all cases

122	567
s122	573
122	567
s128	364
s128	365
s128	367
122	567
s81NW	556
s82NW	827
122	567
s81NW	556
s82NW	827
180	80
122	567
e136	590
136	591
122	567
140	31
122	567
142	193

where, by the fraudulent representations or conduct of any person, an injury is produced for which an action on the case for fraud or deceit may by law be brought, an action of *assumpsit* shall lie upon an implied promise of the wrongdoer to pay all just damages arising from his conduct, *assumpsit* may be maintained against an agent who makes fraudulent representations to induce a purchase of his principal's land.

Error to Livingston; Smith, J. Submitted October 24, 1899; decided January 23, 1900. Rehearing granted April 3, 1900; former order modified May 15, 1900.

Assumpsit by Jennie Hallett against Thomas Gordon, Jr., for a breach of warranty in the sale of land. From a judgment for plaintiff, defendant brings error. Reversed.

William P. Van Winkle and *Fred H. Warren*, for appellant.

Eugene A. Stowe and *Louis E. Howlett*, for appellee.

HOOKEK, J. Gersham Hallett and the plaintiff are husband and wife, and on March 23, 1897, the plaintiff owned the house in which they dwelt, in the village of Howell. Being desirous of exchanging this property for a farm, they had a talk with one Allen about a farm occupied by him, and owned by a Mr. Newcomb, who lived in New York, and ascertained that Mr. Gordon was authorized to sell the same. They called upon Gordon, who looked at their dwelling, and expressed a willingness to exchange the farm for it, and an agreement was reached. The parties do not agree in all respects in regard to this, but it appears that the dwelling was deeded to Gordon, who paid them \$200, with which to buy a team and some other articles, and gave them a land contract for the land in question, which he signed on behalf of Mr. Newcomb, the owner, and in a few days caused him to sign a duplicate of the same; both contracts being drawn at the same time, and both signed by plaintiff and

her husband,—both of them being parties to it. It bound Newcomb to sell the farm for \$800, and to deed and accept a mortgage when \$400 should be paid. It seems to be conceded that there was a difference of \$600 between the prices agreed upon for the places, which, with the \$200 loaned, made \$800, the price mentioned in the land contract. The plaintiff claims that this \$200 was secured upon the horses, and should not be a portion of the consideration for the land, but we think this unimportant. The plaintiff and her husband took possession of the premises at once, and this action is brought upon an alleged breach of warranty. The plaintiff claims that she was induced to make the exchange upon the representation by Gordon that a portion of the premises, at the time overflowed, was tillable, and that the place was worth \$1,400, and that such representation was false. The defendant denies the alleged representation.

The defendant raises a number of questions. He says that the evidence shows conclusively that the contract was between Newcomb, on the one side, and Mr. and Mrs. Hallett, upon the other, and therefore there is a non joinder of a necessary party plaintiff, and that Newcomb, and not himself, should be the defendant. He asserts, also, that there is no warranty proved, and that the action, being *assumpsit*, will not support a recovery for deceit. The declaration is in *assumpsit*. The special counts, upon which the plaintiff elected to stand, are based upon an alleged breach of warranty. Hence, if the defendant is correct in saying that he was not a party to the contract, there is manifestly no liability for a breach of warranty, when he made no warranty. And, again, if it was a joint contract between the plaintiff and her husband, there is a nonjoinder of the latter, which is fatal upon the trial. 1 Saund. Pl. & Ev. (Am. Ed.) 10; *Burgess v. Abbott*, 1 Hill, 476; *Hill v. Gibbs*, 5 Hill, 56; *Brown v. Fifield*, 4 Mich. 322; *Monaghan v. Insurance Co.*, 53 Mich. 252; *Howe v. Hyde*, 88 Mich. 91; 15 Enc. Pl. &

Prac. 564. We must therefore ascertain whether the defendant is right in either of his contentions.

The negotiations between the parties were oral, and the writings do not of themselves show what the agreement was. All they show is that the plaintiff deeded the dwelling to Gordon for a consideration mentioned in the deed, and that a contract of purchase and sale was made between Newcomb, on the one side, and Mr. and Mrs. Hallett, upon the other. Unexplained, there is an implication of two transactions. It is shown, however, that these papers are merely the incidents of a verbal contract, and were executed and delivered to carry it out. And we find that, according to one party, Mrs. Hallett was making a deal with Gordon, while the other says she and her husband were dealing with Newcomb. Either might be true. Mr. Gordon might have agreed to make the exchange, relying on his ability to induce Newcomb to make a deed or a land contract; and, on the other hand, Gordon and Mrs. Hallett may have made a contract in which it was agreed that the land contract should go to herself and husband. So far as that question is concerned, it could only be treated as a question of fact, and upon its determination would depend the questions of non-joinder and misjoinder.

In either case the real contract was oral, and the two writings were given in the way of performance, merely. They were incidents of a contract, given at a later time in furtherance of it. They do not purport to contain the terms of the contract, and it is agreed by all concerned that they do not. Their existence shows performance in whole or in part, and they do not conclusively show which. If it were not for the statute of frauds, requiring the contract to be in writing, parol proof would be admissible, under *Mouat v. Montague, ante*, 334; but, as it is, it places the plaintiff in the attitude of suing upon the breach of a contract which, under the statute, is void because not in writing, or, if it could be contended that the writings do constitute the contract, proving by parol a warranty not

contained in the written contract, which we have held in the case of *McCray Refrigerator, etc., Co. v. Woods & Zent*, 99 Mich. 269 (41 Am. St. Rep. 599), cannot be done.

It seems to have been contended in the original brief that, because the contract has been in part performed, the oral contract has become valid, and the door opened to a suit upon it, in which the warranty may be proved. It is true that part performance does take a case out of the statute to the extent of authorizing a court of equity to enforce a specific performance between the parties in cases where it can be equitably done. Equity takes jurisdiction because, although the contract is partly performed, the law cannot. It does not relieve in all cases,—*e. g.*, when a party has put it out of his power to perform, or where one cannot be put *in statu quo*, or where the rights of third parties have intervened; and in such cases the contract cannot then be treated as valid, and damages awarded in an action at law. We are not cited to authorities that a parol contract becomes valid through part performance, so that it will support an action for its breach.

The plaintiff's supplemental brief shows that it was her original claim in the case that the contract was void under the statute of frauds, for the reason that it (*i. e.*, the contract for the sale of the farm) was signed for and on behalf of Newcomb by Gordon, who had no written authority to do so. It states further that thereupon a copy of such agreement, signed by Newcomb (to whom, defendant claimed, it was sent by arrangement of the parties for such purpose), was introduced, and that then "the plaintiff accepted the theory of the defendant, that the contract was a valid one, and not within the statute of frauds, and announced that she would ask a verdict upon the special counts for a breach of warranty." It states that "the theory of the defendant during the entire trial was that the contract was valid, and the plaintiff, by electing to ask a verdict upon the special counts, by so doing affirmed the contract." It is claimed that,

by signing the land contract, Newcomb ratified the entire original agreement. There is no doubt that, upon the defendant's theory, Newcomb did ratify the contract, and that it was his contract, and not the defendant's contract; and therefore there were no contract relations between the plaintiff and the defendant, who acted merely as an agent for Newcomb in the premises, and, there being no promise made by him, *assumpsit* would lie only against Newcomb, who did make such promises as were made.

But it is said that if this be Newcomb's contract, and not Gordon's, the plaintiff still has a right of action against Gordon, the agent, because of his fraud and deceit. Granting that, the declaration could not be *assumpsit* for the deceit. He should be sued in case, and might be sued separately, or jointly with participants in his fraud. See *Weber v. Weber*, 47 Mich. 569. When the action is brought against the contracting party, there may be cases where the action may be in tort for the fraud, or, by treating the fraudulent representations as warranties (when that can be done), *assumpsit* may be sustained. It is said that the distinction between actions in *assumpsit* and on the case has, however, been largely done away with, and the present doctrine is that the buyer may have his remedy by an action on the warranty, sounding either in tort or in *contract*. But, if that be granted, it can hardly be supposed that an action of *assumpsit* will lie when there is no *contract* (*i. e.*, no promise) between the parties. If we should say that the land contract was valid as to either,—and there is little doubt that it is so,—we should have to say that it contains no contract of warranty. But it is evident that the plaintiff is not relying upon any such, but upon another contract, out of which the writing grew, and of which the giving of the writing by Newcomb was in part performance.

The judgment must be reversed, and no new trial will be ordered.

The other Justices concurred.

ON REHEARING.

PER CURIAM. A reference to the opinion filed on the original hearing will show that this cause went to the jury upon the theory of a breach of warranty in a contract. *Ante*, 568. It was reversed because the alleged contract was void under the statute of frauds. In discussing the case we said that there could be no recovery under this declaration for deceit, and that recovery in such a case for fraud could only be had in an action upon the case. Our attention is now called to a recent statute (3 Comp. Laws 1897, § 10421), which, though an innovation, illogical, and paradoxical, is not necessarily void. We should therefore correct the statement made in the opinion. It can make no difference with the result, however, except that a new trial should be ordered. This authority not having been cited either in the original brief or that furnished at the request of the court, no costs will be allowed upon the motion or rehearing.

The former order will be modified by directing a new trial.

CITIZENS' STATE BANK OF STURGIS v. MCGRAFT
LUMBER CO.

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128	365

CORPORATIONS—MORTGAGES—AUTHORITY FROM STOCKHOLDERS—
STRICT COMPLIANCE—WAIVER—EXECUTION CREDITORS.

That a mortgage given by the officers of a corporation to secure certain of its outstanding obligations was not strictly within the terms of the resolution of the stockholders authorizing a mortgage to be given, the resolution apparently contemplating a new loan, can be taken advantage of only by the corporation or its stockholders; therefore, where the stockholders see fit to waive the departure, and to recognize the instrument as valid, an execution creditor of the corporation

is not in position to raise the question, when brought in as a party defendant upon a bill to foreclose the mortgage. *Beecher v. Mill Co.*, 45 Mich. 103, followed.

Appeal from St. Joseph; Yaple, J. Submitted October 24, 1899. Decided January 23, 1900.

Bill by the Citizens' State Bank of Sturgis against the Sturgis Fair Association to foreclose a mortgage. The McGraft Lumber Company and others were made parties as subsequent incumbrancers. From a decree for complainant, defendant lumber company appeals. Affirmed.

Charles A. Sturgis (*H. P. Stewart*, of counsel), for complainant.

L. N. Keating, for appellant.

MONTGOMERY, C. J. This is a bill filed to foreclose a mortgage given by the Sturgis Fair Association to the complainant on the 29th of July, 1893, to secure certain outstanding obligations. The defendant McGraft Lumber Company is made defendant as a subsequent purchaser or incumbrancer. A considerable number of questions are discussed, but the controversy may be narrowed by a statement. The fair association is organized under Act No. 6 of the Public Acts of 1889. By section 9 of this act it is provided that:

"Said corporation shall also have power, when authorized by a majority vote of the stockholders present at any regular or special meeting, called as in the by-laws provided, to borrow money, and secure the same by mortgage on its property." 2 Comp. Laws 1897, § 6955.

It appears that a meeting of the stockholders was held on the 12th day of July, 1893. A resolution was adopted, reading as follows:

"Whereas, it appearing to the stockholders of the Sturgis Fair Association, at their regularly-called special meeting, that there is an indebtedness against the said association of about \$18,000, secured by the individual

indorsement of the directors: *Therefore*, be it resolved by the stockholders of said association that mortgage indentures be executed upon the real estate of said association for a sum not exceeding \$13,000, bearing a rate of interest not exceeding 7 per cent. per annum, payable semi-annually in advance, and that the president and secretary of this association be, and are hereby, authorized to negotiate the said mortgage loan, and to execute the said mortgage or mortgages, and the necessary promissory notes, for and in the name of the said association."

No new loan was effected, but on the 29th of July a mortgage was given as collateral security to three notes held by the complainant, upon which the association was liable either as maker or guarantor, one of which was past due; the condition of the mortgage being that the notes be paid on the 1st day of August, 1893. The defendant McGraft Lumber Company, on the 11th of July, 1894, recovered a judgment of \$414.92, and \$23.15 costs, against the association, and thereafter levied an execution on the mortgaged property, and became a purchaser at the execution sale.

It is contended that the mortgage given is not, in its terms, the one authorized by a vote of the stockholders, and that it is void as to defendant McGraft Lumber Company. It is true, the execution of the mortgage did not strictly follow the power, but it appears that the corporation never repudiated the mortgage; that it paid interest on the obligations it secured, and does not now, nor does any stockholder, contest the validity of the mortgage. The case is not distinguishable in principle from *Beecher v. Mill Co.*, 45 Mich. 103. In that case it was held that a similar provision of statute was enacted for the protection of the stockholders; that the mortgage was not void, but voidable; and that, where the stockholders chose to waive the formalities required by statute, an execution creditor could not attack the validity of the mortgage. See, also, *Hervey v. Railway Co.*, 28 Fed. 169; *Campbell v. Mining Co.*, 51 Fed. 1; 5 Thomp. Corp. § 6165; 2 Cook, Stock, Stockh. & Corp. Law, 1264. The defend-

ant's counsel cites, in support of his contention, *McKee v. Railway Co.*, 41 Mich. 274, and *Kendall v. Bishop*, 76 Mich. 634. In the *McKee Case* the complainant was not a creditor of the corporation, but accepted bonds of the corporation as collateral to an obligation owing to him by the treasurer of the company; and, so far as appears, this was without the authority of the stockholders. In other words, the bonds were unlawfully diverted, with the knowledge of complainant. The transaction was held to create no liability against the company. In the case of *Kendall v. Bishop* a mortgage was authorized, and what the court considered to be a general assignment was executed in its stead. It was held void as an unlawful preference, and also because not authorized by the directors. The case is unlike the present.

The other questions presented do not call for discussion. All of them have been considered, and no error is discovered.

Decree affirmed.

The other Justices concurred.

KRISELER v. LE VALLEY.

1. MUNICIPAL CORPORATIONS—CLAIMS—FORMALITIES—WAIVER.

Where the common council of a village considers and allows a claim, though not accompanied by an affidavit or by a certificate of an officer of the corporation, as provided by 1 Comp. Laws 1897, § 2754, the formalities will be deemed waived, and their absence, therefore, will not justify the village president in refusing to sign an order for the payment of the claim.

2. SAME—OFFICERS—APPOINTMENT.

Under 1 Comp. Laws 1897, § 2700, providing that the president of a village shall appoint, by and with the consent of the council, such officers as shall be provided for by ordinance or

122	576
881NW	580
131	9
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h136	21
122	576
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122	576
147	312

resolution, an ordinance providing for the appointment of a deputy marshal is sufficient to authorize the appointment of an officer designated by the president as "night watch man and deputy marshal," though his duties are prescribed as commencing at 6:30 nightly, and continuing until 5:30 the following morning.

3. SAME—FAILURE TO GIVE BOND—VACATION OF OFFICE.

Under 1 Comp. Laws 1897, § 2710, providing that a village council may declare an office vacant for failure to give a bond, an office is not vacated by such failure until action by the council.

4. SAME—PRESIDENT—REMOVAL OF OFFICERS.

Under 1 Comp. Laws 1897, § 2729, which provides that the president of a village may remove any officer "appointed by him" when he shall deem it for the public interest to do so, he has authority, when in his judgment the public interest requires it, to remove officers to whose appointment the consent of the council is required.

5. SAME—NOTICE.

Under 1 Comp. Laws 1897, § 2729, authorizing a village president to remove officers appointed by him, a removal is not effective until the officer has been notified thereof.

6. SAME.

A notice to a village officer, signed only by the village clerk, informing him that, at a meeting of the council, all appointive officers were discharged, is not notice of any action by the president, in whom by 1 Comp. Laws 1897, § 2729, authority to remove from office is vested, and it is therefore insufficient to relieve such officer from duty.

Certiorari to Tuscola; Beach, J. Submitted October 24, 1899. Decided January 23, 1900.

Mandamus by Charles F. Krisler to compel Frank D. Le Valley, president of the village of Vassar, to sign an order for salary claimed to be due relator as deputy marshal. From an order granting the writ, respondent brings *certiorari*. Affirmed.

Quinn & Wixson, for relator.

E. H. Taylor, *B. L. Ransford*, and *Huston & Spears*, for respondent.

MONTGOMERY, C. J. This is *certiorari* to review *mandamus* proceedings. The relator presented a claim to the common council of the village of Vassar for services as night watchman and deputy marshal for the month of April, 1899, amounting to \$31.25. The claim was allowed by the common council, and an order was drawn in favor of the relator, and signed by the village clerk. This order was presented to the respondent, who is president of the village, for his signature. Respondent refused to sign the order, and on application to the circuit court of Tuscola county, after a hearing of the petition and return, and concessions made in open court, a writ of *mandamus* was granted, requiring respondent to affix his signature to the order. This is the proceeding to be reviewed.

It is urged that the account presented was informal, and not in compliance with section 2754, 1 Comp. Laws 1897. The section in question is intended to protect the village against suit without an opportunity previously offered to the council to investigate the claim and do justice. It is true, the statute provides the claim shall be accompanied by an affidavit or a certificate of an officer of the corporation. Assuming that this provision was intended to apply to the account of an officer of the village for a fixed salary, the council has the right to insist upon such certificate or affidavit as a condition to its taking action on the claim, but it also has the right to waive the requirement. In this case the council saw fit to treat the claim as sufficient in form, and unanimously allowed the claim. The respondent was not justified in refusing to recognize the action of the council on this ground.

It is contended, however, that there was no such officer as night watchman and deputy marshal. Section 2700, 1 Comp. Laws 1897, provides that "the president shall, by and with the consent of the council, appoint a village marshal and a street commissioner, and such other officers as shall be provided for by resolution or ordinance of the council." It appears that an ordinance creating the office of deputy marshal has been in force since 1882. The coun-

cil proceedings show that on April 11, 1898, the president appointed as night watchman and deputy marshal "Charles F. Krisler, whose duties shall commence at 6:30 nightly, and continue until 5:30 the following morning, at a salary of \$375 per year." This appointment was confirmed by a two-thirds vote. We do not construe this action as an attempt to create the office of night watchman, but rather as intended to designate the relator as a deputy marshal, fixing the hours of his service from 6:30 at night to 5:30 in the morning. The authority for his appointment as deputy marshal must be found in the ordinance creating that office.

But it is contended, and the answer states, that the relator never gave the bond required of a deputy marshal by the terms of the ordinance. Section 2710, 1 Comp. Laws 1897, reads as follows:

"If any person elected or appointed to office shall fail to take and file the oath of office, or shall fail to give the bond or security required for the due performance of the duties of his office, within the time herein limited therefor, the council may declare the office vacant, unless previously thereto he shall file the oath and give the requisite bond or security."

Under this statute the office was not vacated by a failure to give the bond, until some action was taken by the council. See *Mechem*, Pub. Off. §§ 265, 266.

Section 2729 provides that the president may remove any officer appointed by him at any time when he shall deem it for the public interest, and may suspend any policeman for neglect of duty. On the 10th of April, 1899, the president read to the council, and filed, the following:

"I deem it for the public interest that all appointive offices be, and the same are hereby, declared vacant, namely, the office of marshal, street commissioner, night watchman, deputy marshal, member of the water board, whose term has expired, village attorney, health officer, and chief of fire department."

This became a part of the proceedings, and was duly

published. In addition, the clerk served on relator the following notice:

"Council Rooms, Village of Vassar,
"Office of Clerk.

"VASSAR, MICH., April 14, 1899.

"CHAS. F. KRISLER,
"Vassar, Mich.

"*Dear Sir:* You are hereby notified that at a meeting of the common council held April 10, 1899, all officers appointed by the common council last year were discharged, and thereby you are released from further duty as night watchman.

"Yours truly,
"B. P. MILLER, Village Clerk."

In construing the statute, it is to be kept in mind that there are no officers authorized to be appointed by the president alone, except policemen for temporary purposes, and that therefore it is a fair construction of the section quoted which ascribes an intent to vest the power in the president of removal of an officer appointed by him with the consent of the council. It seems more clear that this is what was intended, as no power to remove appointive officers seems to be vested elsewhere.

We think the intent to remove relator is sufficiently manifested by the action taken by the president; but, to render the removal effective, this intention must be manifested to the officer by notice to him. Mechem, Pub. Off. § 460. The notice signed by the clerk was not notice of any action by the president, and no other legal notice was shown to have been served. It follows that the removal of the relator was not shown, and the order of the circuit court should be affirmed.

The other Justices concurred.

COUNTY OF MONTMORENCY v. PUTNAM.

1. COUNTY TREASURER—SETTLEMENT WITH SUPERVISORS—ACTION ON OFFICIAL BOND—ARGUMENT OF COUNSEL.

Where, in an action on a county treasurer's bond, evidence concerning certain settlements between the treasurer and the board of supervisors was submitted to the jury, counsel should have been permitted to argue before the jury the question of the weight to be attached to such evidence.

2. SAME—STATE OF ACCOUNT—PRIMA FACIE EVIDENCE.

Such settlements, at least annually, being provided for by 1 Comp. Laws 1897, § 2479, are *prima facie* evidence of the state of the account, either party, however, being at liberty to show fraud, mistake, or omission.

3. SAME.

Evidence that payments had been made to and by the treasurer which were not credited in the settlements affects only the weight to be given to them as *prima facie* evidence of the state of his account.

Error to Montmorency; Kelley, J. Submitted November 14, 1899. Decided January 23, 1900.

Assumpsit by the county of Montmorency against Edward J. Putnam, principal, and Lewis Jenson and others, sureties, on a county treasurer's bond. From a judgment for plaintiff, defendants bring error. Reversed.

Frank Emerick, for appellants

James Francis, for appellee.

MONTGOMERY, C. J. This is an action on the official bond of the former treasurer of Montmorency county. The evidence on the trial consisted of testimony of expert accountants, the books of the treasurer and vouchers produced, and also three settlements made by and between the treasurer and the board of supervisors. At the con-

122	581
s127	87

122	581
s81	578

122	581
s135	113
s135	115

122	581
s144	135

clusion of the testimony, the circuit judge announced that, in view of the claims of the respective parties, the settlements cut no figure in the case, as determining the amount due, and restricted counsel in the argument of the case when they were trying to make use of the settlements as establishing *prima facie* the state of the account between the treasurer and the county. In the charge to the jury, the circuit judge said, "These settlements are in evidence, and you may consider them, with the other evidence, as tending to show the probability of the claims of these parties;" and proceeded to discuss the settlements somewhat at length. We need not consider whether the charge as a whole dealt fairly with the subject of these settlements, as it is clear that, if the subject was to be considered at all, counsel had the right to argue the question of the weight to attach to them to the jury.

The statute (section 2479, 1 Comp. Laws 1897) provides for such settlements, and for a record of them. They are not conclusive. *Township of Boardman v. Flagg*, 70 Mich. 372; *Bush v. County of Johnson*, 48 Neb. 1 (32 L. R. A. 223, 58 Am. St. Rep. 673). But we think the settlements, while open to impeachment, are to be treated as *prima facie* evidence of the state of the account, either party being at liberty to show fraud, mistake, or omission.

The circuit judge appears to have been of the opinion, at first, that because one of the witnesses for the defendants testified to certain payments made by the treasurer not credited in the settlements, and the testimony tended to show that the county had not been credited with certain moneys collected, the settlements should be wholly discarded. We think this testimony affected only the weight to be given to them. The defendants' counsel did not claim that the settlements were conclusive, but claimed the right to discuss the weight to be given to them. This was denied them, and in this there was error.

Judgment reversed, and a new trial ordered.

The other Justices concurred.

DICKINSON v. HENDERSON.

1. WILLS—CLAIMS OF WIDOW—WAIVER—ALLOWANCE OF EXECUTOR'S ACCOUNT—TRUSTEES.

The fact that testator's widow, entitled under the will to the income of his estate for life, failed to make any claim on the executors before the approval of their accounts showing that such sums had been turned over to trustees under the will, did not constitute a waiver of her right to the income so paid over, there having been no final order for the distribution of the fund.

2. SAME—ALLOWANCE FOR SUPPORT—PAYMENT.

Moneys shown by an executor's final account, as approved by the probate judge, to have been paid to the widow for her support, will be treated as made from the testator's estate, and not from the income thereof bequeathed to the widow, though no formal order was entered on her petition for such an allowance.

3. PROBATE COURTS—ORDER OF ALLOWANCE—JUDGE'S MEMORANDUM.

Where, on hearing a widow's petition for support pending the settlement of her husband's estate, the probate judge entered a memorandum in his docket, "Widow allowed net income for support," such memorandum did not constitute an order, and cannot be considered on appeal from a decree approving payments made to the widow by the executor and trustee.

4. ESTATES OF DECEDENTS—NET INCOME—WHAT CONSTITUTES.

An executor, charged with the duty of paying over to the widow the "net income" of the estate, must deduct, before making payment of the income, the necessary expenses, such as taxes, repairs, and costs of collection, incurred in caring for the estate.

Appeal from Wayne; Lillibridge, J. Submitted November 15, 1899. Decided January 23, 1900.

Bill by Julian G. Dickinson, surviving trustee under the last will and testament of Davis Henderson, deceased, against Charles D. Henderson and others, for a construc-

tion of said will, and to obtain an order approving certain payments to the widow. From a decree for complainant, defendants appeal. Modified and affirmed.

John D. Conely, for complainant.

Morse Rohnert, for defendants.

MONTGOMERY, C. J. This is a bill filed to obtain a construction of the will of Davis Henderson, deceased, and to obtain an order approving certain payments made to the widow by complainant as executor and trustee. The two clauses of the will which bear on the question involved are the second and fifth. The second reads as follows:

"I give, devise, and bequeath to my wife, Elizabeth Sinclair Henderson, for and during her natural life, in lieu of dower, and subject to the trusts hereinafter specified, all and singular the rents and profits of all my real estate, and the income from all the rest and residue of my personal property and effects, of every name and nature."

The fifth is in part as follows:

"I hereby nominate as executors of this, my last will, my wife, Elizabeth Sinclair Henderson, and Julian G. Dickinson, and do hereby appoint them trustees for the following purposes: To take possession of and manage all my said real estate, personal property, and effects during the life of my said wife and during the minority of my said grandchildren; * * * to collect all moneys due and belonging to my estate, and keep the same invested in good, interest-bearing, first mortgages on real estate in the city of Detroit; to pay over to my said wife all the net income from rents and from interest collected on any of said investments, keeping the principal of all my personal estate, invested as aforesaid, intact during the life of my said wife."

Complainant and Mrs. Henderson duly qualified as executors, and took possession of the estate, which consisted of real property valued at upwards of \$40,000, and personal property, securities, accounts, and money in bank amounting to \$38,508.79. Pending the settlement of

the estate, a petition for a widow's allowance was filed, and a hearing had thereon. No formal order of allowance was made and entered, but in the judge's docket, under the head of "Remarks," is entered, "Widow allowed net income for support." On the 2d of December, 1891, the executors presented their separate final accounts as executors, which were later allowed, as presented, by the probate judge. In this account appear items aggregating \$3,700 "paid Elizabeth S. Henderson, widow, for her support." In this account complainant took credit for \$25,976.41 turned over to the trustees under the will, and Mrs. Henderson took credit for \$335 so transferred. During the period of administration, the rents collected aggregated \$2,232.16, and the interest earned \$886.05, which, with \$230.93 earned on the Griffith mortgage prior to the probate of the will, but collected by the executors, amounted to \$3,349.14. Complainant, on request of Mrs. Henderson, turned over to her this entire sum of \$3,349.14, considering that she was entitled to the same under the terms of the will. The present controversy concerns this payment.

It is contended by the defendants that, the account of the executors having been allowed without any such payment having been made, the complainant, as trustee, had no authority to make payment thereafter, and that in no view was the widow entitled to more than the net income. On the other hand, complainant contends that Mrs. Henderson was by the terms of the will entitled to the income of the estate, as her own property; that the unsigned memorandum of the probate judge never became an order from which an appeal could be taken, or strictly an order of court; that the order approving the final account of the executors approved of the payments made to Mrs. Henderson for her support, and that it must be assumed that the payments were made from the personal estate of deceased, and not from the income; that the order approving the account, and the payment of the trust fund into the hands of the trustees, did not change the character of the fund, or deprive Mrs. Henderson of her property right in and to the income of the estate.

We are cited to the case of *Lawrence v. Security Co.*, 56 Conn. 423 (1 L. R. A. 342), as sustaining defendants' contention that, failing to make any claim on the executors for the income during the administration of the estate, the widow waived her claim to such income. The case cited falls short of sustaining the contention. In that case there had been a distribution of the fund, with the sanction of the court, given by an order entered after the widow had had her day in court. This order was held final. In the present case the effect of the order allowing the account was to find that there had been turned over into the hands of the trustees a certain sum of money. No order was made as to the distribution of the fund, and we think the property rights of Mrs. Henderson were not cut off by the order.

The order approving the account involved an approval of the payments made to Mrs. Henderson for her support. We think this allowance must be treated as having been made from the estate left by the testator, and not from the income. The memorandum made on the petition of the widow never assumed the form of an order, and cannot be considered. *People v. Eaton Probate Judge*, 40 Mich. 244. We think so much of this fund as the will provides shall be paid to Mrs. Henderson, she had the right to have paid to her after it was placed in the hands of Mr. Dickinson as trustee.

The decree below approves the payment of the gross income, without any deduction whatever for expenses of collection, repairs, or taxes. We do not think this was intended by the will. On the contrary, the intention to preserve the estate is manifest. The decree will be modified by providing that complainant is entitled to credit for the payment made to Mrs. Henderson to the extent of the net income only. The appellants will be entitled to costs of this court. As we are convinced of the good faith of complainant, no costs will be allowed for the proceedings in the circuit to either party.

The other Justices concurred.

FOLEY v. DWYER.

1. PLEADING—AMENDABLE DEFECT—OBJECTION NOT RAISED BELOW.

Where an alleged defect in the form of a declaration was such that an amendment would have been permitted had the question been raised at the trial, an objection based thereon, raised for the first time on appeal, will not be considered.

2. LAND CONTRACTS — COVENANTS — ACTION FOR INSTALLMENTS.

Where the purchaser's covenants, in a contract for the sale of land, to pay installments of interest and taxes, are not dependent upon the conveyance or tender of conveyance by the vendor, the latter may maintain an action at law for such interest and taxes paid by him, without any tender.

3. SAME—ASSIGNMENT—RELEASE OF PURCHASER.

An assignment of the purchaser's interest under an executory contract for the sale of land to one who agrees, in consideration of the vendor's assent, to fulfill the obligations of the purchaser, though consented to in writing by the vendor, is insufficient to release the assignor from liability upon a covenant to pay interest and taxes.

Error to Wayne; Frazer, J. Submitted November 16, 1899. Decided January 23, 1900.

Assumpsit by John S. Foley against John M. Dwyer and others upon a contract for the purchase of real estate. From a judgment for defendants on verdict directed by the court, plaintiff brings error. Reversed.

Keena & Lightner, for appellant.

Brennan, Donnelly & Van De Mark, for appellees.

MONTGOMERY, C. J. The plaintiff and defendants entered into a contract for the sale and purchase of certain real estate in the city of Detroit. Plaintiff declared on the contract, adding the common counts, and alleging as a breach the failure of defendants to pay taxes and interest according to its terms and provisions, and adding:

122	587
124	222

122	587
d126	7

122	587
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122	587
140	481

122	587
158	467
158	458

“Whereby plaintiff has been deprived of the profits and advantages which might and would otherwise have accrued to him from the performance of the said contract, and has incurred a great expense in endeavoring to procure the completion of the said purchase on the part of the defendants, and is paying the taxes and assessments on said property, and is otherwise greatly injured, to the damage of the plaintiff \$5,000.”

In the first paragraph of the contract plaintiff agrees, for the consideration thereafter specified, to convey to the defendants the property set forth. The second paragraph fixes the purchase price at \$10,750, and stipulates that interest at the rate of 6 per cent. per annum shall be payable on the 1st days of January and July in each and every year, and that the defendants shall pay all taxes and assessments against the property. In the third paragraph the defendants agree to buy the premises at the consideration price above stated, and on the terms above set forth. By paragraph 4 it is agreed that the plaintiff might pay any tax assessments, which would then be added to the consideration of the contract, and become payable as a part of the next payment; and this paragraph contains the following stipulation: “This contract may be assigned by the consent of said first party in writing indorsed hereon.”

Defendants pleaded the general issue, and gave notice of an assignment of the contract and consent of the plaintiff, claiming thereby a release of defendants from all obligations under the contract. There is no dispute as to the amount of interest and taxes due and unpaid. On the trial the plaintiff introduced in evidence the contract of sale, and proved the amount of interest and taxes due. The defendants introduced in evidence an assignment of the contract from the defendants to George Dingwall, and also the consent of the plaintiff to such assignment. Both the assignment and the consent were indorsed on the back of the contract, and dated March 2, 1896, the same date as the contract. At the request of defendants' counsel, the trial judge instructed the jury to render a verdict for the defendants on two grounds:

First. That the plaintiff could not maintain an action at law to recover for taxes paid or installments of interest, and that his remedy must be found on the equity side of the court.

Second. That the consent of the plaintiff to the assignment of the contract by defendants to Dingwall was a novation, releasing defendants from all the obligations of the contract.

1. The position taken by defendants at the trial in respect to the first proposition was stated in their objection to the introduction of the lease as follows:

"It appears that the document sued on, or the contract relied on, is a contract for the sale of land; that the sum sued for is alleged or claimed to be the interest which accrued from time to time on this contract; that at the present time the entire principal appears to be due on the contract. There can be no recovery in this action, or in an action at law for the breach, for the purchase price, or any portion of it. The interest, of course, accruing from time to time, is a part of the purchase price. On a land contract the only action maintainable at law is an action for a breach, the measure of damage being the difference between the value of the land (the vendor retaining the title) and the purchase price agreed upon. An action at law, according to the authorities, is not sufficient, because it does not cover all the rights of the parties. There is no claim there was a tender of any deed. He could not tender a deed unless the principal amount was paid. At the time this action was brought the principal amount was not due."

In this court an argument is made based on the form of the declaration, it being contended that the declaration seeks to recover damages for the breach of the contract, and is not properly framed to recover for the installments due when the action was brought. It is not claimed that the declaration contains sufficient averments to entitle the plaintiff to recover general damages for a breach of the contract. On the contrary, it is said that it does not, as it does not show that the plaintiff has taken the necessary steps to entitle him to the advantage of the default. But it is insisted that the declaration contains enough aver-

ments looking in that direction to render it bad as a declaration to recover for the installments due.

We need not consider whether the averments of damages resulting from breach of the contract by the defendants may be treated as surplusage, as we are convinced that this question was not raised on the trial; and, had it been raised, the court might properly have permitted an amendment. *Ross v. Township of Ionia*, 104 Mich. 320; *Findlay v. Railroad Co.*, 106 Mich. 700; *Wierengo v. Insurance Co.*, 98 Mich. 621; *Moore v. Thompson*, 108 Mich. 283.

Has the vendor in a land contract a right of action at law to recover installments growing due on such contract at a date earlier than that at which the vendor is required, by the terms of the contract, to make title? It is contended by the defendants that the installments are a part of the purchase price, and that the general rule is that the vendor is not entitled to recover a part of the purchase price, but is limited to a recovery of damages for the breach or a specific performance in equity. We think the solution of the question involved is reached by the application of well-settled rules. If the defendants' covenants to pay the installments of interest and taxes were dependent on the conveyance or tender of conveyance by plaintiff, there can be no recovery. If the covenants were independent, we can see no reason why an action at law may not be maintained. The general rule is that, where a day is appointed for the payment of money, or part of it, and the day is to happen or may happen before the thing which is the consideration for the money is performed, an action may be brought for the money before performance. In such case it is presumed that the party relied upon his remedy, and did not intend to make the performance a condition precedent. See note to *Cutter v. Powell*, 2 Smith, Lead. Cas. 23 *et seq.* The precise question here involved arose in *Wilks v. Smith*, 10 Mees. & W. 355. Parke, B., said: "The consideration for the defendant's paying the interest is the plaintiff's *undertaking* to sell

the land, not the actual sale of it. The plaintiff is not bound to do anything before the money is paid." See, also, *Harrington v. Higgins*, 17 Wend. 376; *Batley v. Beebe*, 22 Kan. 81; *First Nat. Bank v. Agnew*, 45 Wis. 131; *Regents of the University v. Detroit Young Men's Soc.*, 12 Mich. 138.

2. The defendants gave in evidence an assignment made March 2, 1896, reading as follows:

"In consideration of one dollar and other valuable consideration to us in hand paid by George Dingwall, and by and with the consent of John S. Foley, party of the first part in the contract of sale annexed, we do hereby assign and transfer the annexed contract to the said George Dingwall, his heirs and assigns. And I, George Dingwall, assignee as above named, do hereby accept the above assignment, and, in consideration of the assent of John S. Foley to said transfer, do hereby covenant and agree to assume and fulfill all the obligations thereof on the part of said assignee to be fulfilled."

Beneath this was written:

"I do hereby consent to the above assignment.

"JOHN S. FOLEY. [Seal.]"

Did this assignment, made with the consent of plaintiff, operate to relieve the defendants? There is no release in terms. The assent is given in terms to an assignment, which implies a transfer of the rights of the assignor. True, the assignee covenanted to fulfill the conditions of the contract, but there was no covenant by plaintiff to release the defendants, and look to the assignee, Dingwall. A question closely analogous has been before this court, and ruled in accordance with plaintiff's contention. *Wine-man v. Phillips*, 93 Mich..223. In that case it was held that the assignment of a lease with the consent of the lessor did not operate to discharge the lessee from his covenant to pay rent. In *Bailey v. Wells*, 8 Wis. 141 (76 Am. Dec. 233), the same rule was laid down in a case where the terms of the assignment were not materially different from the one under consideration in this case.

The learned circuit judge was apparently of the opinion that a distinction should be taken between the cases cited and the present, for the reason that the landlord, having put the tenant in possession, has substantially performed his contract, unless there be covenants for repairs, while in the present case the contract is still executory on the part of the plaintiff. We think this distinction is not supported by the authorities. The ground upon which the assignor is held still liable, notwithstanding the assignment of his lease and the acceptance of rent from the assignee, is that the covenant to pay rent is still in force. *Fletcher v. McFarlane*, 12 Mass. 43. Now, it could be urged in such case that the assent to the assignment would discharge a covenant to pay rent with as much force as it can be in this case that a like assent operates as a release of the covenant to pay interest, taxes, or the unpaid portion of the purchase price. In either case the assignor no longer enjoys the benefit of what he has covenanted to pay for, but in either case he is held on his covenant, because it has not been, in terms, discharged.

Judgment is reversed, and a new trial ordered.

The other Justices concurred.

FRENCH v. TOWNSHIP OF SOUTH ARM.

1. TOWNSHIPS—CONTRACT BY TOWNSHIP BOARD—VALIDITY—FAIR GROUNDS.

A township board has no power, at least in the absence of authority conferred upon it by the electors legally assembled, to bind the township to pay for money and labor expended in putting land owned by the township in condition to be rented to a county agricultural society for use in holding annual fairs.

2. SAME—APPLICATION OF FUNDS.

One who, under the supervision of a township board, expends money and labor in improving township lands, with the design of putting them in condition for use as fair grounds, is entitled to have applied upon his claim against the township for the money and labor so expended a fund raised by vote of the electors for the making of such improvements, even though his agreement is invalid for want of authority in the township board to make it. HOOKER and GRANT, JJ., dissenting.

Error to Charlevoix; Corbett, J. Submitted November 17, 1899. Decided January 23, 1900.

Assumpsit by Walter L. French against the township of South Arm to recover an amount alleged to be due for improving certain lands for a park and fair grounds. From a judgment for defendant on verdict directed by the court, plaintiff brings error. Reversed.

Frederick W. Mayne, A. D. Cruickshank, and A. B. Nicholas, for appellant.

E. N. Clink and Pratt & Davis, for appellee.

LONG, J. This cause was heard before a jury. After plaintiff rested, defendant's counsel offered no testimony, and the court below directed the verdict in favor of defendant. Plaintiff brings error.

It appears that the defendant township became the owner of 40 acres of land for park and fair-ground purposes. After the title was acquired, the township board began to make improvements upon the premises by fencing, grading, and the construction of a one-half mile driveway for teams and bicycles, and preparing the grounds for baseball. A corporation known as the Charlevoix County Agricultural Society exists in that county. In order to secure the holding of the fairs of that society in South Arm, it is claimed that the electors, at the annual township meeting held in 1894, voted to raise one-fourth of 1 per cent. that year and one-fifth of 1 per cent. in 1895, on the assessed valuation of the township, to improve the grounds. These amounts were spread upon the tax rolls for those years, and for the year 1894 the sum of \$819.20 was paid to the township treasurer, and in 1895 the sum of \$677.36. August 4, 1894, the township board borrowed \$2,500, from which amount the sum of \$600 was appropriated to improve the grounds. The improvements were completed, and the grounds rented to the agricultural society for fair purposes for 20 years, commencing October 2, 1894. Since that time the township has annually raised money for improving the lands. It appears that the plaintiff was employed by the town board to make the improvements. He commenced work on June 4, 1894, and has expended in money and services \$2,236.29. The work was done under the supervision of the township board. He bought materials, paid for labor, furnished men and teams. The board paid him, out of subscriptions paid in by citizens and by note and mortgage, certain sums, leaving a balance due him of \$1,000. He had a settlement with the township board a few days before the annual township meeting, showing such balance. The township treasurer, it is claimed, made a report to the electors at the annual township meeting in 1895, showing the amounts paid plaintiff and the balance remaining unpaid. This report was adopted by the electors, and a vote to raise the one-fifth of 1 per cent.

for that year was passed. The township board thereafter, however, refused to pay the amount due plaintiff. This action is commenced for its collection. The court below instructed the jury that the contract was void; that the evidence failed to show that any contract was made with plaintiff by the electors legally assembled in any meeting, or by any legal meeting of the township board.

It appears that the contract with plaintiff by which this indebtedness was created was made in 1894, and counsel for defendant contend that at the meeting of the electors in 1895 the question of the indebtedness of the township to plaintiff was not brought before the electors, and that the electors never authorized its payment, but that the one-fifth of 1 per cent. was levied for improvements. We think the record bears out this contention, and that the court was right in saying that the indebtedness was not created by a vote of the electors, or ratified by them, and that it was beyond the power of the township board to bind the township for its payment. But it appears that there were certain sums of money voted by the electors for the purpose of improvement of these grounds. These moneys were raised by taxation, and actually went into the hands of the township treasurer. There remained of this fund in his hands, unexpended, in March, 1896, the sum of \$311.74, and on March 30, 1897, \$118.84, and at the annual settlement with the treasurer in 1898 the sum of \$26.23. This suit was commenced early in 1898, at which time there was in the hands of the treasurer, of the moneys raised by taxation for improvements to the grounds, at least \$26.23. This money had been appropriated by the electors for the payment of just such work as the plaintiff had done. He was entitled to that amount, and any other amount that remained of the fund at that time should have been paid to him by the board. We are unable to state the amount from the record.

The court below was in error in directing the verdict for defendant. The judgment must be reversed, and a new trial ordered.

MONTGOMERY, C. J., and MOORE, J., concurred with LONG, J.

HOOKEER, J. (*dissenting*). I am unable to concur with my brethren in this case as to the application of the money actually raised by the township. This money was raised by tax upon the vote of the township to raise one-fifth of 1 per cent. for fair-ground purposes. It is conceded that the township had no authority to raise money for a fair ground. Inasmuch as it has done so, however, it is now proposed to compel it to spend it for such purpose. It is admitted that plaintiff has no valid contract, for he did the work under a bargain which he was bound to know that the township was not authorized to make. This being so, there is no contract liability that he can enforce by action. The judgment should be affirmed.

GRANT, J., concurred with HOOKEER, J.

JOHNSON v. COSTIGAN.¹

1. HUSBAND AND WIFE—PARTNERS—CREDIT—EVIDENCE.

Evidence, in an action against a wife for the price of goods, that upwards of 40 notes, running through a period of several years, were given to plaintiffs, having only her signature, and that the business was done in her name, and the credit extended to her alone, was sufficient to justify a finding that she was a sole trader, and not a partner with her husband, though both testified that they were partners.

2. SAME—INSTRUCTIONS.

Where, in an action against a wife for the price of goods, the jury were explicitly told that if, as defendant claimed, the goods were sold to defendant and her husband as partners, there could be no recovery in that action, a further instruc-

¹ Rehearing denied April 3, 1900.

tion that, notwithstanding "they were doing business with other people, they had a right to make this contract, * * * and, if they made it, they are bound by it," was not prejudicially erroneous, though, standing alone, it might be held misleading.

Error to Wayne; Donovan, J. Submitted November 17, 1899. Decided January 23, 1900.

Assumpsit by Waldo M. Johnson and Richard O. Wheeler, copartners as Johnson & Wheeler, against Theresa L. Costigan, for goods sold and delivered. From a judgment for plaintiffs, defendant brings error. Affirmed.

Malcolm C. Yerkes (*Bacon & Palmer*, of counsel), for appellant.

Lucius H. Collins (*William B. Jackson*, of counsel), for appellees.

MOORE, J. The plaintiffs are wholesale grocers. They recovered a judgment against defendant for groceries which they claim were sold to her. It is the claim of defendant that she formed a partnership with her husband under the name of T. L. Costigan & Co., and that the goods were sold to the firm, and that, as under the Michigan decisions she could not engage in a partnership with her husband, she is not liable. The record discloses that the defendant in this case was the defendant in *Sherrod v. Costigan*, 111 Mich. 644, and the business involved in this transaction is the same business which was the subject of controversy in that case. The defendant submitted two special questions to the jury: *First*. Were Mr. Costigan and defendant doing business as partners in September, 1894, and thereafter? *Second*. Did Mrs. Costigan, the defendant, authorize Mr. Costigan to purchase goods of plaintiffs, and have them charged to her alone? The first of these questions was answered "No," and the last one "Yes."

It is claimed by defendant a verdict should have been directed in her favor, for the reason that the testimony showed the sales were made to T. L. Costigan & Co. It is true, Mr. Costigan and his wife both swear that the business was done, not as the business of Mrs. Costigan, but as the business of T. L. Costigan & Co.; but their cross-examination showed that upwards of 40 notes, running through a period of several years, were given to the plaintiffs, having the signature of no one but the defendant,—notes that were signed by her personally. It also appeared that she claimed to have bought the business from her husband, as administrator of the estate of her son, who had formerly conducted the business, for the sum of \$1,400, while the testimony offered on the part of the plaintiffs tended to show the business was done in the name of Mrs. Costigan, and the credit was extended to her alone. We think there was an abundance of testimony to justify the verdict of the jury.

It is claimed by the defendant that the jury included in their verdict a sum of money loaned to the husband of the defendant to enable him to pay his saloon license. These items do appear in the bill of particulars, but the husband testified they had been paid, and we do not think it can be said these amounts were included in the verdict.

Some witnesses were sworn on the part of defendant who testified they had dealt with the firm of T. L. Costigan & Co. In his charge the judge used this language:

“I will say to the jury that, if they were doing business with other people, they had a right nevertheless to make this contract with Johnson & Wheeler, as the plaintiffs claim, and, if they made it, they are bound by it; if she made it, she is bound by it.”

It is claimed this is error. The language is not clear, and, standing alone, might mislead the jury; but the court, in another portion of his charge, told the jury very clearly and explicitly that, if these goods were sold to Costigan & Co., plaintiffs could not recover. They were also told that, unless the contract related to the separate estate of

the defendant, plaintiffs could not recover. The answers of the jury to the special questions indicate very clearly that they did not believe the firm of Costigan & Co. had any existence, and it is evident the portion of the charge quoted did not mislead them.

Some question is made as to the admission of evidence. We are not satisfied from an examination of the record that reversible error was committed.

The judgment is affirmed.

The other Justices concurred.

MOORE v. AUDITOR GENERAL.

TAXES—PAYMENT BY CHECK—PURCHASE OF STATE TAX LANDS—PRIORITIES.

A tax is not paid by the giving of a check therefor to the collecting officer, but the lien continues until presentation and payment of the check. Hence, an applicant to purchase state tax land, required by section 84 of the tax law, as a condition to the purchase, to pay all taxes remaining a lien upon the land, who pays the current taxes by check to the local treasurer, is entitled to a deed of the land as against a prior applicant whose application was filed after the giving of the check but before its payment by the bank.¹

Mandamus by John R. Moore to compel Roscoe D. Dix, auditor general, to issue a tax deed. Submitted October 26, 1899. Writ granted January 23, 1900.

Charles E. Miller and *Jay P. Lee*, for relator.

Horace M. Oren, Attorney General (*Cahill & Wood*, of counsel), for respondent.

¹ But see Act No. 228, Pub. Acts 1899, approved subsequent to the time when this controversy arose.

LONG, J. This is a *mandamus* proceeding to compel the respondent to issue state deeds to relator for the lands described in the petition, which lands, it is claimed, were held as state tax lands, and were subject to sale as such at the time of the application of relator hereinafter mentioned. It appears that in December, 1898, relator wrote a letter to the auditor general, inclosing \$500, and asking for the amount necessary to pay to purchase the lands mentioned. Some correspondence took place between the relator and respondent upon this subject, in the course of which the relator was informed that it would be necessary to pay the 1898 taxes, which were then a lien upon the lands, and which must be paid at the offices of the township treasurers. On the 30th day of January, 1899, the relator sent a check to the township treasurer of Rockland township for an amount sufficient to pay the taxes of 1898 upon so much of the lands as are situated in the township of Rockland; and on the 3d day of February he sent a check to the treasurer of the township of Matchwood for an amount sufficient to pay the taxes of 1898 upon so much of the lands as are in that township. Both of said checks were drawn upon the Bank of Ironwood. A few days later relator received receipts from each of said township treasurers showing on their faces that the taxes of 1898 had been paid.

On the 7th day of February relator went personally to the office of the auditor general, at Lansing, and tendered to the auditor general sufficient money to pay for the deeds mentioned, and exhibited to the auditor general tax receipts from the township treasurers referred to; but the auditor general refused to issue deeds to said relator, upon the ground that applications had been made for the purchase of said lands by Charles M. Turner, on behalf of John M. Longyear and Edward W. Sparrow, as to a portion of the lands; by Edward G. Jones, of Appleton, Wis., on behalf of himself and Rush Winslow, as to a portion of the lands; by one Frederick H. Begole, of Marquette, for a portion of the lands; and by one R. B.

McPherson, of Howell, Mich., on behalf of William McPherson, Jr., for a portion of the lands; that the Turner application, so called, was made on the 6th day of February, 1899; the Jones application, on the 2d day of February, 1899; the Begole application, on the 1st day of February, 1899; and the McPherson application, on the 4th day of February, 1899. Upon being advised by the auditor general that deeds would not be issued to him, the relator telegraphed to the Bank of Ironwood, directing said Bank of Ironwood to withhold payment of one of said checks; but on the next day (being the 8th of February) relator again telegraphed to said bank, advising the payment of the check. Neither of the checks in question was actually paid by the bank upon which they were drawn until after the 7th day of February. The check made payable to the order of the treasurer of Rockland township, for the sum of \$687.91, was paid on the 8th day of February, 1899, and the check payable to the treasurer of Matchwood township was paid on the 9th day of February, 1899.

On the 8th day of February the relator made a new application for the purchase of the lands in question, which application was numbered 4,299, and at the same time tendered to the auditor general an amount sufficient to pay the claims of the State against the lands in question, and again demanded deeds for said lands; and the respondent again refused to issue deeds to the relator, upon the ground that previous applications had been made for such lands by said Turner, Jones, Begole, and McPherson. Later, and on the 28th day of March, 1899, relator, together with his attorney, called upon the auditor general, and submitted to him proofs that the taxes of 1898, which were paid in the township treasurers' offices, were originally paid by check of relator, and that the money was not actually received by the treasurers upon said checks until after the said 7th day of February, 1899, and after all the applications had been made by the said Turner, Jones, Begole, and McPherson. At said inter-

view relator insisted that, at the time of the applications of said adverse claimants, the liens for the taxes of 1898 upon the lands in question had not been discharged, and that said liens were discharged on the 8th and 9th of February, respectively, by the payment of relator's said checks; and relator again demanded deeds of the lands in question by virtue of relator's said application No. 4,299. Upon respondent's again refusing to issue such deeds, relator filed the petition in this case, an order to show cause was issued, and the respondent's answer was interposed.

It is the contention of the auditor general that he had the right to rely and act upon the information given him by the relator, and in fact that all the taxes of 1898 had been paid not later than the 3d day of February, which was prior to the time the Turner application was filed for Longyear and Sparrow, and even prior to the time the application was filed by McPherson. The auditor general says in his return that prior to February 6, 1899 (that being the date the Longyear and Sparrow application was filed), the taxes for 1898 had been paid on all the lands described in the relator's petition, and that respondent so understood the fact to be; that, at the time such (Longyear and Sparrow) application was received, respondent understood, from information received from relator, as hereinbefore shown, that the taxes for 1898 upon said lands had already been paid, and were no longer a lien upon said lands, but no formal certificate of such payment up to that time had been filed in the auditor general's office; that the said \$7,700 deposited by said Turner (for Longyear and Sparrow) with his application was sufficient to purchase all titles held by the State, and pay all taxes appearing by the books of respondent's office to be due upon the lands described in said list subsequent to the titles so purchased; that from the certificates of the several township treasurers of the townships in which the lands described in said application are located, on file in respondent's office, it appears that the taxes on said lands for 1898 were paid prior to February 6, 1899.

While relator concedes that the checks were given at the times herein stated, he still insists that those payments of the taxes were not completed until the checks were presented by the township treasurers to the bank and actually there paid, which was on the 8th and 9th days of February, 1899, and that therefore his application made February 8, and again presented on March 28, 1899, was the only application made after the taxes of 1898 had been paid to the township treasurers. We think the relator is right in this contention, as matter of law, and certainly the equities of the case are all on his side. If the other applications are to be treated as sufficient, those parties will be given all the benefits derived from the payment of the 1898 taxes by the relator. They paid no part of them, but now seek to have advantage of the payments made by relator. Mr. Justice COOLEY lays down the rule that:

“A tax collector has no authority to receive anything in payment of taxes but such money as at the time is legal tender, or at least passes current. He has no right to receive the promissory notes of individuals; and a bank check is only conditional payment, and the tax will remain in force if the check is dishonored.” Cooley, Tax'n (2d Ed.), 452.

This doctrine is recognized in *Kahl v. Love*, 37 N. J. Law, 5; *Alkan v. Bean*, 8 Biss. 83; *Koones v. District of Columbia*, 4 Mackey, 339. The doctrine of those cases is that where an attempt has been made to pay taxes by check, and for any reason the check is not paid, the tax continues to be a lien upon the lands in question, and the lands may be sold, as in ordinary tax proceedings, for the payment of the taxes so remaining a lien. See, also, *Elliott v. Miller*, 8 Mich. 132; *Jones v. Wright*, 34 Mich. 371; *Turnbull v. Township of Alpena*, 74 Mich. 625; *Woodbury v. Lewis*, 1 Walk. Ch. 256; *Carter v. Lewis*, 27 Mich. 241; *Mumford v. Armstrong*, 4 Cow. 553. It must therefore be held that at the time the application of Longyear and Sparrow, as well as all the other

applications, was made, the taxes were a lien upon the property; for, if these checks had not been paid, the treasurers could have returned the lands as delinquent. Under the rule of this court in *Hughes v. Jordan*, 118 Mich. 27, and cases following it, no one has the right to a deed of the lands from the State without first paying these subsequent taxes. When the relator paid his money on February 8, and again made the demand for the deeds on March 28, 1899, these subsequent taxes had been paid, and he was entitled to his deed. We have not overlooked the cases of *People v. Commissioner of State Land Office*, 19 Mich. 470, and *Hubbard v. Auditor General*, 120 Mich. 505. In the first case it does not appear but that the draft in controversy was paid before the rights of the contesting applicant accrued. In the second case it appears that the checks had been given by the tax-title purchasers, they had been paid, and the deed issued, before the rights of third parties intervened.

The petition of the relator must be granted, and the auditor general directed to issue deeds to him, and cancel the deeds issued to the other parties.

MONTGOMERY, C. J., HOOKER and MOORE, JJ., concurred. GRANT, J., did not sit.

PAYN v. GIDLEY.

CONTRACTS—HUSBAND AND WIFE—ESTOPPEL—REPLEVIN—DEMAND.

Where a husband signed for his wife a contract whereby it was stipulated that a tenant of land purchased by the wife, of which she desired possession, should be allowed, if he vacated the premises, to re-enter and harvest wheat sowed by him, the wife to have a fourth of the crop so harvested, and she, after accepting rents paid under the contract, and taking possession pursuant to its terms, attempted to repudiate the authority of her husband to sign the contract, and denied the tenant's right to the wheat, and drew it into her own barns, the tenant was authorized in bringing replevin for the same without any previous demand.

Error to Grand Traverse; Corbett, J. Submitted November 17, 1899. Decided January 23, 1900.

Replevin by George Payn and Julia Payn against Howard E. Gidley and Ella M. Gidley. From a judgment for plaintiffs, defendant Ella M. Gidley brings error. Affirmed.

C. G. Turner, for appellant.

Pratt & Davis, for appellees.

MOORE, J. This is an action of replevin, brought to obtain possession of a quantity of wheat. From a judgment rendered in favor of the plaintiffs by the circuit judge, before whom the case was tried, the defendant Ella M. Gidley has brought the case here by writ of error. The facts are simple. Mr. Payn and his wife were in possession of a farm. Mrs. Payn had a lease of the farm, and was the tenant of Mr. Gleason. Mr. Gleason made an exchange of the farm for property the title to which was in Mrs. Gidley, and deeded it to the defendants, subject to the rights of Mr. and Mrs. Payn. The Gidleys

afterwards wanted possession of the farm, and on the 30th of November, 1897, a written contract was drawn by which the Payns paid the rent by making a bill of sale of personal property, and arranged to surrender the possession of the premises subject to certain conditions, some of which were as follows :

“In further consideration of the premises, said Gidleys agree to allow said Payns to harvest, gather, and take off from said lands and premises all of the wheat and straw from the crop which they have put in thereon this fall, to be harvested during the season of 1898; said Gidleys agreeing to neither commit, suffer, nor allow any waste or damage thereto by their own stock or others, and to do what may be necessary to protect the same from such damage or waste, should any such protection become necessary during said time, in a husbandman-like manner. But said Payns agree to harvest, gather, and thresh such wheat crop in a good, husbandman-like manner, at the proper time and season, at their own expense, and, when so done, to deliver to said Gidleys, in the half bushel, one-fourth part of the wheat so gathered therefrom, when so threshed.”

This contract was signed by Mr. and Mrs. Payn and by Mr. Gidley, who also signed it for his wife. The Payns moved off the farm, and the Gidleys moved upon it. In the following June, Mrs. Gidley undertook to repudiate, in a written notice to the plaintiffs, the authority of her husband to sign the contract, and denied that plaintiffs had any right to the wheat, and claimed to be the owner of it herself. She retained the rent which had been paid by reason of the contract, and the possession of the farm given her by virtue of it. When the wheat was ripe, Mr. Payn attempted to harvest it. Mrs. Gidley then filed a bill, and obtained an injunction restraining Mr. Payn from harvesting the wheat. The injunction was dissolved. Mrs. Gidley testified as follows as to what then occurred :

“After the injunction was dissolved, I had Mr. Gidley keep right on cutting the wheat. I guess he cut about 20 acres; I don't remember. Mr. Payn cut the rest.

Mr. Payn and Mr. Gidley together cut the whole. As soon as it was cut, we commenced hauling it into the barn. They drew in one load. We did that claiming we were entitled to all the wheat.

"Q. If the wheat hadn't been replevied from you, you would have hauled it all into the barn?"

"A. Well, it had to be taken care of by some one. We claimed to own it, and intended to haul it all into the barn, and thresh it."

The wheat was then replevied, with the result already stated. It is the claim of Mrs. Gidley, through her counsel, that, as she was in the lawful possession of the wheat, replevin could not be brought until after a demand had been made upon her; counsel citing a great many cases. The trouble with the contention is that it has no facts to base it upon. Mr. Payn put in the wheat. He and his wife were in possession of the farm. They yielded possession of the farm by reason of the contract. Mrs. Gidley could not profit by the contract and at the same time repudiate it. By the terms of the contract, she was entitled to only one-fourth of the wheat, and was not entitled to that until after it was harvested and threshed. When it was threshed, it was delivered to her representative. Her assumed possession of the wheat was unlawful.

Judgment is affirmed.

The other Justices concurred.

122	608
581	568
182	1605
182	1607

BRONSON ELECTRIC CO. v. RHEUBOTTOM.

1. CORPORATIONS—LIEN ON STOCK—BY-LAWS.

A by-law creating a lien on stock for debts of the stockholder to the corporation is valid, though not binding as against innocent purchasers for value.

2. SAME—ASSIGNMENT OF COLLATERAL—FORBEARANCE TO SUE—PAROL AGREEMENT—BONA FIDE PURCHASER.

A creditor who accepts from his debtor a note for the amount due, payable on demand, together with shares of corporate stock assigned as collateral, obtains no more than the shareholder's equity in the stock, though he agrees by parol to forbear bringing suit for a time in consideration of its receipt: since, the parol agreement being incompetent to be shown in the event of immediate suit upon the note, there is no sufficient consideration for the assignment.

Appeal from Branch; Yaple, J. Submitted December 2, 1899. Decided January 23, 1900.

Bill by the Bronson Electric Company against Frank C. Rheubottom, Celeste M. Bond, administratrix of the estate of William H. Bond, deceased, and Joseph W. McCausey, to establish a lien on certain stock in complainant corporation. From a decree dismissing the bill, complainant appeals. Reversed.

John B. Shipman, for complainant.

H. H. Barlow, for defendant McCausey.

MOORE, J. The complainant is a corporation organized under chapter 127, 1 How. Stat.; section 4192 providing:

"Certificates of stock may be transferable, but the transfer shall not be valid unless a record of the same shall be made on the books of the company in such form as the directors shall prescribe."

At the stockholders' meeting of the corporation, November 28, 1895, all being present, including the defendants Rheubottom and Bond, and voting therefor, by-law 6 was passed, reading as follows:

"Any stockholder desiring to sell his or her shares of stock in this incorporation shall first notify the president or secretary of such fact, and give him and the board of directors ten days in which to purchase, or find a purchaser for, said stock. At the expiration of said ten days' time the stockholder may sell at pleasure, providing the stockholder is not indebted to the company. Any indebtedness for lighting or any other purpose to the company shall become a proprietary lien on the stock to the full amount of the indebtedness."

On March 6, 1896, a contract was made by Rheubottom and Bond with the company, which Rheubottom and Bond failed to carry out, and when the bill was filed there was due upon it to the company \$650. Rheubottom and Bond each owned 50 shares of stock in the company. Their certificates are dated December 11, 1895. These certificates provide that the stock is "transferable only on the books of said company, in person or by attorney, on the surrender of this certificate."

On December 21, 1896, Rheubottom and Bond were indebted to the Union City National Bank in the sum of \$935.71, which indebtedness was then due. The bank demanded payment, and Rheubottom and Bond desired an extension, and offered as security the 50 shares of stock owned by Rheubottom and the 50 shares of stock owned by Bond. At the time this offer was made, Rheubottom and Bond stated that they could sell this stock for \$1,800, but hoped to get more, and that they could sell the stock at any time, and pay the indebtedness. The president of the bank suggested that they give such collateral security for the loan until such time as they could sell it. These shares of stock were, under such arrangement, indorsed in blank, and delivered to the bank, and a note given for the indebtedness, which, in words and figures, is as follows:

“\$935.71.

UNION CITY, MICHIGAN,

“December 21, 1896.

“On demand after date, we, or either of us, promise to pay J. W. McCausey, president, or order, nine hundred and thirty-five dollars and seventy-one cents, at the Union City National Bank, value received, with annual interest at seven per cent.

[Signed] “RHEUBOTTOM & BOND.”

At the time of this offer and transfer, the bank had no notice or knowledge of the existence of any claim on the part of the Bronson Electric Company upon such stock. The bank held the stock and their note, without taking any steps for collection, until February 15, 1897. In February the bank was notified that complainant claimed a lien on the stock. The bank, on the 15th day of February, 1897, gave personal notice, and advertised the same for sale on the 15th day of March, 1897, at public auction, at their banking office, in Union City; and on March 15, 1897, it was sold and bid off in form for \$275, Mr. McCausey acting as representative of the bank, auctioneer, and the bidder for and buyer of the stock. At the time of the sale he was again informed by officers of the company of the complainant's claim upon the stock. The stock has never been presented to the company, or transferred upon its books; nor has McCausey or any one else asked to have it transferred, or surrendered the certificates to the company. Both Rheubottom and Bond were, and are still, insolvent.

The bill was filed to enforce the complainant's lien upon the stock for the amount owing it by Rheubottom and Bond under their contract, and for its sale to satisfy the same; McCausey, having a subsequent claim upon it, being made a defendant. The bill was taken as confessed by both Rheubottom and Bond's administratrix, after personal service upon each. McCausey alone answered, admitting Rheubottom and Bond each owned 50 shares of complainant's stock, as alleged; alleging that they owed the Union City National Bank, of which he was president, \$935.71, “and, desiring an extension of

such indebtedness," gave it their note for that amount, due on demand, and to secure the note turned over this stock, the bank knowing nothing of complainant's lien upon it; that Bond is dead, and his estate is insolvent, and Rheubottom is also insolvent; that afterwards, and before the bill was filed, the bank sold the stock to satisfy the note, and it was bid off by him, and "he is the *bona fide* owner thereof, and paid a valuable consideration therefor, and that the same is now in his possession," etc. To this answer a general replication was filed, and, as to him, the case was heard on proofs. The decree dismissed the bill.

A good many questions are argued in the briefs, but we think it necessary to discuss but two of them:

First, did the complainant have a lien upon the stock for the amount of the debt due to it from Rheubottom and Bond? The complainant answers this question in the affirmative, and cites the following authorities: 2 Beach, Priv. Corp. §§ 644-646; 1 Cook, Stock, Stockh. & Corp. Law, §§ 522, 524, 525; 1 Thomp. Corp. § 1032; Ang. & A. Corp. §§ 325, 355; 1 Mor. Priv. Corp. § 201; Wood's Field, Corp. § 122; 2 Cook, Corp. §§ 524, 525; 1 Spell. Priv. Corp. §§ 478, 486; *Jennings v. Bank of California*, 79 Cal. 323 (5 L. R. A. 233, 12 Am. St. Rep. 145); *Reading Trust Co. v. Reading Iron Works*, 137 Pa. St. 282; *Mohawk Nat. Bank v. Schenectady Bank*, 78 Hun, 90; *Wetherell v. Loan Ass'n*, 153 Ill. 361; *New England Trust Co. v. Abbott*, 162 Mass. 148 (27 L. R. A. 271); *Tuttle v. Walton*, 1 Ga. 43; *John C. Grafflin Co. v. Woodside*, 87 Md. 146; *Cunningham v. Trust Co.*, 4 Ala. 652; *St. Louis Perpetual Ins. Co. v. Goodfellow*, 9 Mo. 149; *M'Dowell v. Bank of Wilmington*, 1 Har. (Del.) 27; *Child v. Hudson's Bay Co.*, 2 P. Wms. 207; *Spurlock v. Railroad*, 61 Mo. 319; *Vansands v. Middlesex County Bank*, 26 Conn. 144; *Planters', etc., Ins. Co. v. Selma Sav. Bank*, 63 Ala. 585, 594. There is some conflict in the authorities upon this proposition. 1 Thomp. Corp. § 1032, states the rule as follows:

“According to the weight of authority, a by-law creating a lien on the shares of a member for debts due by him to the corporation is valid and binding, though not as against innocent purchasers for value.”

The second question then becomes pertinent: Was the bank an innocent purchaser for value? On the part of defendant McCausey it is insisted an agreement to forbear bringing suit for an indefinite time, if followed by actual forbearance for a reasonable time, is a good consideration; citing *Calkins v. Chandler*, 36 Mich. 320 (24 Am. Rep. 593); *Howe v. Taggart*, 133 Mass. 284. See, also, *Clark*, Cont. 171, and cases cited. On the other hand, it is urged that the bank did not change its relations with Rheubottom and Bond; that its debt was an antecedent one; that the bank held the stock as collateral security upon an old debt, and that this did not make it an innocent holder for value, or exempt the stock from being chargeable with all equities against it,—citing *McGraw v. Solomon*, 83 Mich. 442; *Edson v. Hudson*, Id. 450, 455; *Henriques v. Ypsilanti Sav. Bank*, 84 Mich. 168, 176; *Schloss v. Feltus*, 103 Mich. 525 (36 L. R. A. 164); *Brooke v. Struthers*, 110 Mich. 562, 569 (35 L. R. A. 536); *Vincent v. Hansen*, 113 Mich. 173, 174. It does not appear very clearly by the testimony that it was agreed the bank should forbear suit. Three writings were passed upon the occasion when the stock was transferred. Two were the assignments in blank upon the certificates of stock, and the other was a note, a copy of which already appears herein. This note might have been sued immediately by the bank, and, if sued, Rheubottom and Bond could not set up, by way of defense, any agreement to forbear suit. *Phelps v. Abbott*, 114 Mich. 88. The bank had the same right to immediately sue this note which it had to sue before the note was given. *Peninsular Sav. Bank v. Hosie*, 112 Mich. 351; *Hitchings v. Edmands*, 132 Mass. 338. It parted with nothing when the stock was assigned to it, and we do not think it can be said it was an innocent purchaser for value. The most

that can be said in its favor is that it obtained the right to sell whatever equity Rheubottom and Bond had in the stock, and apply the proceeds on its debt.

It is urged in the briefs of counsel that complainant failed to show that Rheubottom and Bond were indebted to it. The record shows otherwise. Mr. Warner swore positively to the amount of the indebtedness, and no evidence was offered to the contrary. The complainant is entitled to a lien on the stock of \$650 and interest.

The decree of the court below is reversed, and one will be made here directing a sale of the stock to satisfy this lien; the balance, if any, to be paid to the defendant McCausey. Complainant will recover costs of both courts.

The other Justices concurred.

RENACKOWSKY v. BOARD OF WATER COMMISSIONERS OF	122	613
DETROIT.	126	636
	122	613
	128	386
1. LIMITATION OF ACTIONS—PLEADING—DEMURRER.	128	387
The question of limitations as a defense in an action at law	128	404
cannot be raised by demurrer.	128	409
	128	410
2. CONSTITUTIONAL LAW—INTRODUCTION OF BILLS IN LEGISLA-	122	613
TURE—FIFTY-DAY LIMIT.	81W	581
Article 4, § 28, of the Constitution, which provides that no new	e129	37
bill shall be introduced into the legislature after the first 50	e129	38
days of a session shall have expired, does not render invalid	122	613
a section attached to a bill after the expiration of the 50-	d135	538
day period, if the bill itself was introduced in time, and the	122	613
section was a proper one to be embodied in the bill. So held	136	21
with reference to the provision of Act No. 463, Local Acts	136	592
1895, amendatory of the Detroit city charter, limiting the	122	613
time within which actions may be brought for negligent	145	472
injuries.		

8. LIMITATION OF ACTIONS—DEFENSES—ESTOPPEL.

In an action for personal injuries, plaintiff may meet a defense of limitation by showing that defendant, by promising a settlement, led him to believe that a suit to enforce his claim was unnecessary.

Error to Wayne; Wisner, J., presiding. Submitted October 3, 1899. Decided January 23, 1900.

Case by August Renackowsky against the board of water commissioners of the city of Detroit for personal injuries. From a judgment for defendant on demurrer to the declaration, plaintiff brings error. Reversed.

Brennan, Donnelly & Van De Mark (Selling & Hatch, of counsel), for appellant.

Arthur Webster (Charles Flowers and C. D. Joslyn, of counsel), for appellee.

MONTGOMERY, C. J. The plaintiff brought this action to recover for injuries sustained by reason of the negligent act of defendant in the year 1893. The suit was instituted in December, 1897. To a declaration setting up the facts the defendant interposed a demurrer, setting up a statute of limitations as to such actions, enacted in 1895, and in effect September 1, 1895 (Act No. 463, Local Acts 1895). By stipulation, the plaintiff amended his declaration, setting up, as reasons why the statute of limitations had not run, the following facts:

“1. That the said defendant recognized the fact that the plaintiff had a cause of action against the said defendant, and by reason of said recognition plaintiff was induced to permit the time to pass in which the statute provides that suit shall be brought against said defendant.

“2. That the said defendant from time to time made payments to plaintiff in consideration of his cause of action, which payments continued until November 1, A. D. 1897.

“3. That the said defendant, before the time limited for bringing suit against it had run, adopted a resolution

in which it was resolved that said plaintiff should receive his full pay as long as he was disabled, regularly, whether he worked or not.

"4. That said defendant, upon the 20th day of November, A. D. 1897, declined to pay plaintiff his said claim, assigning various reasons, but not stating as one of its reasons that the claim was barred by limitation.

"5. That the entire course of conduct of the defendant has been such as to render it unjust and inequitable that the said limitation should be set up as the defense of this action."

No further pleading was filed, but the demurrer was treated as directed to the amended declaration. The case proceeded to hearing on demurrer, and judgment passed for defendant. Plaintiff brings error.

Three questions are raised:

1. Can the question upon which the case turned be raised by demurrer?
2. If it can, is the statute constitutional?
3. If both of the foregoing questions are resolved in the affirmative, has the defendant estopped itself from relying upon the statute?

The general rule is that the statute of limitations must be pleaded, and that the defense cannot be raised by demurrer. 13 Enc. Pl. & Prac. 200. It is stated by defendant's counsel that in this case all the facts relied upon by the plaintiff to establish an estoppel to plead the statute of limitations were set up in the declaration as amended. The plaintiff's counsel did not concede this, and, as the plaintiff was not bound to set up these facts in the first instance (*Dean v. Crall*, 98 Mich. 591 [39 Am. St. Rep. 571]), we do not feel justified in departing from the practice, and determining the case on demurrer.

We ~~might rest our decision on this question of practice,~~ but as the other questions are fully briefed, and are necessarily involved in the case, we deem it proper to express our views upon them. The question as to the constitutionality of the act was discussed in the briefs of counsel in *Springer v. City of Detroit*, 118 Mich. 69, and, al-

though in the opinion the question was not discussed, the act was treated as valid. We have re-examined the reasons urged against the validity of the act, and are of the opinion that the act is valid. See *City of Detroit v. Wayne Circuit Judge*, 112 Mich. 317.

The meritorious question involved in the case is whether the plaintiff may meet the defense of the statute by showing that, before the time fixed by statute for the bar, the defendant, by its course of conduct, led the plaintiff to believe that a suit to enforce his rights would be unnecessary, and thereby lulled him into a feeling of security. Defendant's counsel cite authority to the effect that an action for tort, once barred, cannot be revived by a new promise. 1 Wood, Lim. 176. The reason for this is plain. In actions on contract it is the new promise which supports the action, while an action for tort cannot be based on a promise. But the claim of the present plaintiff is not that a cause of action once barred has been revived by a new promise, but that the conduct of the defendant has induced the plaintiff to refrain from bringing action within the period fixed by statute, and that such conduct should estop the defendant. In a similar case (*Armstrong v. Levan*, 109 Pa. St. 177), Mr. Justice Paxson said:

"It was not the question of the revival of a tort by a promise to pay made after six years. The conversation referred to occurred before the statute had run, and it was a distinct promise to pay in consideration that the plaintiff below would not sue. If, therefore, she relied upon this promise,—if she was thereby lulled into security, and thus allowed the six years to go by before she commenced her suit,—with what grace can the defendant now set up the statute? The promise operated, not to revive a dead tort, but by way of estoppel. It has all the elements of an estoppel."

See, also, *Voorheis v. Benefit Society*, 91 Mich. 469.

The judgment will be reversed, and the case remanded, with leave to the defendant to plead over. The plaintiff will recover costs in this court.

The other Justices concurred.

WHITELEY v. INGHAM CIRCUIT JUDGE.

COSTS—DISCONTINUANCE—EJECTMENT.

Under 3 Comp. Laws 1897, § 11260, which provides that, in all actions in which the plaintiff would be entitled to costs upon a judgment rendered in his favor, if, after the appearance of the defendant, such plaintiff shall discontinue his suit, the defendant shall have judgment for "his full costs," a defendant in ejectment who takes a new trial under the statute, and who subsequently has judgment upon discontinuance by the plaintiff, while not entitled to have taxed against the plaintiff the costs paid in compliance with the statutory requirements giving a new trial, is entitled to recover the costs of the first trial, including his attorney's fees for that trial, and the stenographer's and witness fees. GRANT, J., dissenting.

122	617
146	482

Mandamus by James Whiteley and others to compel Rollin H. Person, circuit judge of Ingham county, to allow relators certain costs in an action of ejectment. Submitted December 12, 1899. Writ granted January 23, 1900.

Smith & Hood, for relators.

Charles F. Hammond, for respondent.

LONG, J. This was an action of ejectment, and on the trial in the circuit court the plaintiff had judgment. The defendants removed the case to this court by writ of error, where the judgment was affirmed. Subsequently defendants exercised their statutory right of a second trial, by the entry of the usual order, conditioned on the payment of all costs up to that time, which costs the defendants paid, and the case stood for trial in the usual manner. Before another trial was reached, the plaintiff voluntarily dismissed her suit; the defendants consenting thereto on payment of costs to be taxed. The defendants presented

to the clerk of the circuit court a bill of costs for taxation, which included the statutory fees and costs of the trial in the circuit court, as given to prevailing parties. Objection being made to these costs, the clerk, upon a hearing in the matter, disallowed the same, but taxed such costs and fees as defendants were entitled to arising subsequent to the order granting the second trial. On motion for re-taxation before the circuit judge, the clerk's action was affirmed, and the order was made of which relators complain.

The respondent contends that there is no statute entitling the relators to tax the costs and fees of the first trial, and that they are entitled only to such costs and fees as are given by law on the discontinuance of a case. It is insisted that the proceedings to and including the first trial were fully and forever closed when the order for a second trial was entered, and the defendants, as a condition therefor, paid the costs of that trial, which the statute imposed, and that, therefore, relators cannot claim any costs arising before that time. On the other hand, counsel claim that the relators are entitled to all their costs incurred since the commencement of suit, under the provisions of section 11260, 3 Comp. Laws 1897, which provides:

“In all actions and proceedings in which the plaintiff would be entitled to costs upon a judgment rendered in his favor, if, after the appearance of the defendant, such plaintiff be non-suited, discontinue his suit, be non-prossed, or judgment pass against him on verdict, demurrer, or otherwise, * * * the defendant shall have judgment to recover against such plaintiff his full costs, which shall have the like effect as all other judgments.”

We think the relators are correct in their contention. The claim made by them is not that they are entitled to recover back what they paid on the removal of the case to this court, nor what they paid to obtain a second trial in the action of ejectment. Those costs they would have no right to recover, under the rule laid down in *Jeffery v.*

Hursh, 58 Mich. 246, 259, as they were costs paid in compliance with the statutory requirements giving them a new trial. Their claim is that they are entitled to recover their costs of a trial in ejectment; that is, attorney fees: (1) For proceedings before notice of trial, \$15; (2) for subsequent proceedings before trial, \$5; (3) for trial of issues of fact, \$15,—together with term fees when case is on calendar and not reached, some other disbursements, and their witness fees. We think relators are entitled to recover these fees, amounting to \$99, under the provisions of the section above quoted. The clerk, however, struck out all their costs, except proceedings before notice of trial, \$15; for all subsequent proceedings before trial, \$5; March term fees, 1899, \$5; May term fees, 1899, \$5; affidavit to bill of costs, 25 cents; taxation of costs, 25 cents,—making \$30.50 allowed the relators as costs, thus striking out their attorney fees for trial of cause, the stenographer fees, and all witness fees; and this was affirmed by the circuit court. The relators' taxable costs were properly stated by them in their tax bill; and the order of the circuit court and the action of the clerk of that court must be reversed, and the costs taxed as claimed by relators, and set forth in their tax bill. The relators will recover the costs of this motion. The cause will be so certified to the circuit court.

MONTGOMERY, C. J., HOOKER and MOORE, JJ., concurred with LONG, J.

GRANT, J. (*dissenting*). Relators were defendants in an ejectment suit tried in the circuit court, appealed to this court, and affirmed. *Whiteley v. Whiteley*, 110 Mich. 556. Relators were granted a new trial under section 10981, 3 Comp. Laws 1897. Before trial was had, plaintiff submitted to a voluntary nonsuit, which was consented to by the relators. Relators now seek to recover costs of the first trial, in which the judgment was affirmed in this court. But for the statute, relators' right to further litigation would have been ended. The statute, however, gives them the right, upon certain conditions, to

have a new trial, which conditions are the payment of all damages and costs which have been awarded against them by the judgment in the first trial. The payment of these costs is the sole condition upon which they are entitled to it. By the former judgment relators were obliged to pay their own costs. That judgment is conclusive of all costs incurred up to that time. It is conceded that they could not recover of the plaintiff the costs which they had paid as a condition for the new trial. Why should they be permitted to recover costs which they had paid out in that suit at their own expense in support of their own defense? The judgment is as conclusive as to costs in the one case as in the other. The case is, upon a new trial given by grace of the statute, to be tried *de novo*, and the prevailing party can only recover whatever costs he has incurred from that date up to the final judgment. I think the circuit court reached a correct conclusion, and that the writ of *mandamus* should be denied.

ASHWELL v. BULLOCK.

TITLE TO OFFICE—MANDAMUS—QUO WARRANTO.

When an office is already filled by an actual incumbent, exercising the functions of the office *de facto* and under color of right, *mandamus* will not lie to compel him to turn over the books and papers pertaining to the office to one who disputes his title; *quo warranto* being the proper remedy.¹

Certiorari to Wayne; Frazer, J. Submitted December 12, 1899. Decided January 23, 1900.

Mandamus by William H. Ashwell to compel Fred C.

¹ As to *mandamus* to compel surrender of office, see note to *Stevens v. Carter*, (Or.) 81 L. R. A. 342.

122	620
f122	691
122	620
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122	620
134	616
122	620
157	683

Bullock to turn over to relator the books and papers pertaining to the office of secretary of the school board of the village of Highland Park. From an order denying the writ, relator brings *certiorari*. Affirmed.

Clifton D. Gordon, Henry B. Graves, and Charles H. Hatch (H. H. Hatch, of counsel), for relator.

F. L. Brooke and Rowland M. Connor, for respondent.

MOORE, J. In July, 1899, the school board of Highland Park consisted of Trustees Thorpe, Kneale, Ketcham, Davison, Langdon, and Bullock. The last named was secretary of the board. An election was held July 10, 1899, to elect trustees in the place of Davison, Langdon, and Bullock, whose terms expired. At that election Davison, Ashwell, and Voorheis received more votes than did their opponents. July 19th the old board held a meeting, when Davison, Ashwell, and Voorheis all tendered their acceptance of the office of trustee. The board received the acceptance of Davison, but declined to receive the acceptance of either Ashwell or Voorheis, for the reason that, at the time of the election, their names did not appear upon the assessment roll, and it was claimed they were not eligible to the office of trustee. The old board then adjourned. Kneale, Ketcham, Bullock, and Langdon on the same day held a meeting, and elected officers. Bullock was re-elected secretary, and has continued to hold the books and papers pertaining to the office, claiming to be the legally-elected secretary. On the 17th of August, Thorpe, Davison, Ashwell, and Voorheis held a meeting, and elected Ashwell secretary. On the 15th of September he made a demand for the books and papers pertaining to the office upon Bullock, who refused to deliver them to him. He then petitioned the Wayne circuit court for a writ of *mandamus* to compel the delivery of the books to him. The court denied his petition, and this is a proceeding to review the action of the circuit judge by means of a writ of *certiorari*.

It was the claim of the petitioner that, at the time of the election, he and Voorheis both had property liable to assessment, and that the failure of the assessing officer to assess them did not render them ineligible to the office. The circuit judge was of the opinion that the title to an office was involved, and that a writ of *mandamus* was not a proper remedy. It is urged upon the part of relator that the circuit judge was in error, and that, where a public officer is *prima facie* entitled to an office, a writ of *mandamus* is the proper remedy to compel his predecessor to deliver up the books and papers pertaining to the office; citing High, Extr. Leg. Rem. §§ 73, 74; *Ketcham v. Wagner*, 90 Mich. 271; *Huntley v. Finley*, McGrath, Mand. Cas. No. 1180. It is apparent from the statement of the case already made that not only does the respondent claim to be secretary of the board, but he also claims that the relator is not only not secretary of the board, but that he is not a member of the board, for the reason that he was not eligible to an election as a member of the board; so that not only is his title to the office of secretary questioned, but his title to the office of trustee. It is also clear that, if Ashwell and Voorheis were not eligible to be elected trustees, then Ashwell could not be elected secretary. The inquiry involves, not only the title to the office of secretary, but also an inquiry into the titles of Voorheis and Langdon, neither of whom is before the court, to the office of trustee. Under such a condition, the rule is as follows:

“In determining the extent to which the courts may properly interfere by *mandamus* with questions relating to the title to and possession of public offices, it is necessary to recur to an important principle, frequently asserted throughout these pages, and which may be properly termed the controlling principle governing the entire jurisdiction by *mandamus*. It is that, in all cases where other adequate and specific remedy exists at law for the grievance complained of, the writ of *mandamus* is never granted. Applying this principle to cases where relief has been sought to determine disputed questions of title to and possession of public offices, the courts have almost

uniformly refused to lend their aid by *mandamus*, since the remedy by information in the nature of a *quo warranto* is justly regarded as the most appropriate and efficacious remedy for testing the title to an office, as well as the right to the possession and exercise of the franchise. And the rule may now be regarded as established by an overwhelming current of authority that, when an office is already filled by an actual incumbent, exercising the functions of the office *de facto* and under color of right, *mandamus* will not lie to compel the admission of another claimant, or to determine the disputed question of title. In all such cases, the party aggrieved, who seeks an adjudication upon his alleged title and right of possession to the office, will be left to assert his rights by the aid of an information in the nature of a *quo warranto*, which is the only efficacious and specific remedy to determine the questions in dispute. And whenever it is apparent, on the face of the pleadings, that the issue presented involves a determination as to the person properly elected to an office or entitled to exercise its functions, the writ of *mandamus* will be withheld." High, Extr. Leg. Rem. § 49.

See, also, *People v. Common Council of Detroit*, 18 Mich. 338; *School Dist. No. 8 of Tallmadge v. Root*, 61 Mich. 373; *Pariseau v. Board of Education of Escanaba*, 96 Mich. 302.

The only decisions of our court which are apparent exceptions to this rule are *Lawrence v. Hanley*, 84 Mich. 399, and *Ketcham v. Wagner*, 90 Mich. 271. The first of these cases was one where the chairman of the board of auditors applied for a *mandamus* to compel the sheriff to return to him books and papers belonging to the board of auditors. A reading of the case shows that the sheriff had no business with the books, which were lawfully in possession of Mr. Lawrence when taken from him. The court used the following language:

"This would dispose of the matter at present before us, but it does not settle the question really in issue. We deem it for the public good, the case being to us so clear, to decide here and now the question of the right to the office as between Collins and Leteker. This is not usual in *mandamus* proceedings, *quo warranto* being

in most cases the most appropriate proceeding to test the right to hold an office; but the exigencies of the case, as we view it, and the public interest, demand that the question shall be speedily determined, which cannot be done by *quo warranto*. And when a person in office *de jure et de facto* is interfered with by one whose lack of title is plain, and governed by adjudicated cases in our own courts, it is not only proper, but best, to settle the question by *mandamus*. * * * We think the title to this office is clearly ruled by *People v. Lord*, 9 Mich. 227. There was no vacancy occasioned by the death of Nagel that the governor could fill by appointment."

In the case of *Ketcham v. Wagner*, the opinion shows the question of the title to the office was not involved, the court holding that the respondent was neither expressly nor impliedly retained in office, and therefore had no right to retain the books and papers. Whatever may be said of these cases, it is very clear the case before us is not taken out of the rule. We think the circuit judge made a proper disposition of the case.

Affirmed.

The other Justices concurred.

BALCH v. JAYCOX.

DEEDS—MISDESCRIPTION—REFORMATION—EXECUTION.

Where a husband attempts to convey land to his wife without consideration, believing she would thereby be enabled to qualify as surety upon his liquor bond, and the conveyance fails on account of a misdescription, an execution against him, levied on the land sought to be conveyed, will stand, although the wife seeks in equity to reform the deed.

Appeal from Alcona; Simpson, J. Submitted January 3, 1900. Decided January 23, 1900.

Bill by Theresa Balch against James A. Jaycox, George G. Jaycox, and George W. Balch to restrain an execution sale and to reform a deed. From a decree for complainant, defendants Jaycox appeal. Reversed.

Main J. Connine, for complainant.

O. H. Smith (R. J. Kelley, of counsel), for appellants.

HOOKEK, J. The *locus in quo* is a piece of land in the village of Harrisville, 4 by 24 rods in size. In 1881 it was owned by Balch. He also owned and resided upon another parcel, known as "Lot 8." On June 29, 1881, Balch made a deed to his wife, upon a recited consideration of "one dollar and other good and valuable considerations." It described lot 8, and a parcel 4 by 24 rods in size, adjoining the premises in dispute upon the south. There was no intention to convey the second parcel described, which Balch did not own, and it was included through a mistake in an attempted description of the parcel north of it, which, as stated, Balch did own. This deed was made for the sole purpose of enabling the wife to become his surety upon a liquor dealer's bond which he then contemplated giving, and afterwards did give, and which the wife signed as surety. Whether it was accepted or not does not appear. Balch became indebted to the defendants Jaycox in 1886, and they obtained a judgment against him in February, 1888. They took an execution, and attempted to have it levied upon the land of Balch, but the same mistake was made in the description that was made in the deed. In 1894 a bill in aid of execution was filed, and issue was joined. Upon the hearing the mistake was discovered, and then the defendants Jaycox dismissed their bill, took a new execution, and caused it to be levied, by a correct description, upon the premises upon which they had previously attempted to obtain a levy. Thereupon Mrs. Balch filed the bill in this cause to restrain the sale and correct the deed. The defendants Jaycox appeal from a decree in favor of Mrs. Balch.

It is contended by counsel for the defendants that the conveyance was without consideration, and therefore voluntary, and that, while it was valid, and passed the title to lot 8, which was correctly described, it gave Mrs. Balch no legal claim to the parcel misdescribed; as to that, the attempted conveyance failed through the misdescription; and that Mrs. Balch has no equitable interest in the parcel. The evidence fails to show that a gift was intended, or that any contract was made in relation to the giving of the bond. The conveyance was attempted merely to make Mrs. Balch eligible as a surety, not as a consideration to support a promise to become a surety. Apparently, she was willing to sign said bond without compensation,—an idle ceremony, by the way, as such a bond could not bind her. It was therefore subject to levy as the property of the husband.

The decree is reversed, and the bill dismissed, with costs of both courts.

The other Justices concurred.

KOOISTRA v. ROCKFORD INSURANCE CO.

INSURANCE—SURRENDER OF POLICY—AUTHORITY OF AGENT.

Plaintiff applied to L., an insurance agent, for insurance upon her property, and was informed by L. that the companies which he represented would not accept the risk, but that he would try to place it elsewhere. The local agents of several companies were consulted by L., and policies were successively issued, all of which were ordered canceled when reported to the companies concerned, among which companies was defendant. After a fire, plaintiff sought to hold defendant liable, upon the ground that L. had no authority to accept notice of cancellation and surrender the policy. *Held*, that plaintiff could not be sustained in the inconsistent conten-

tions that L. had authority to surrender prior policies, which, unless canceled, would render subsequent insurance void, and yet, under precisely the same state of facts, had no authority to surrender the policy in suit.

Error to Kent; Adsit, J. Submitted January 3, 1900.
Decided January 23, 1900.

Assumpsit by Almira C. Kooistra against the Rockford Insurance Company of Rockford, Illinois, upon a fire policy. From a judgment for plaintiff, defendant brings error. Reversed.

Plaintiff, the owner of a frame hotel in the village of Conklin, authorized her husband to procure, if possible, insurance upon it. He applied to one Lathrop, an insurance agent. Mr. Lathrop testified that he informed Mr. Kooistra that it was a hard risk; that he could not write it in the companies represented by him, but that he might be able to place it elsewhere. The negotiation was carried on entirely between Mr. Kooistra and Mr. Lathrop. Mr. Kooistra's version of the conversation was that he applied to Mr. Lathrop for insurance on the 19th of February, 1898, left with him the deeds containing the description of the property, paid him \$50 upon the premium, and instructed him to procure insurance, to which Lathrop replied, "All right." Mr. Lathrop made no attempt to secure the insurance in his companies. He first applied to one Melis, local agent of the Continental Insurance Company. Melis issued a policy, delivered it to Mr. Lathrop, and reported the risk to his company. The company refused to carry it, and ordered its cancellation. Melis notified Lathrop, who surrendered the policy for cancellation, and it was canceled. Lathrop then applied to one Bodwell, the local agent of several companies, including the defendant. Bodwell told Lathrop that he did not know whether his company would carry it, but he would try. He then wrote the policy in suit, delivered it to Mr. Lathrop, made the daily report thereof to his company, which refused to carry it, and instructed Mr. Bodwell to cancel it. Bodwell

notified Lathrop of his instructions, but told him that he had written back an explanation to the company in regard to the risk. The policy was not then canceled. To this letter of Mr. Bodwell the defendant replied, still refusing to carry the risk, and instructing him to cancel it. Bodwell notified Lathrop, who then produced the policy, which was in his possession, and surrendered it to Bodwell for cancellation. It was canceled on March 17, 1898, returned to the home office of the defendant, and destroyed.

Lathrop had paid Bodwell the premium, \$54. Bodwell did not then return the premium to Lathrop, but by agreement it was left with Bodwell for the purpose of procuring other insurance, and Bodwell attempted to obtain insurance in another company,—the Milwaukee Mechanics', of which he was the local agent. Bodwell wrote this policy and delivered it to Lathrop. That company promptly refused to carry the risk, and ordered its cancellation. Bodwell so notified Lathrop, and Lathrop surrendered to him that policy, which was canceled. March 3d Lathrop applied to Bodwell for insurance upon the personal property in the hotel. Bodwell wrote a policy in the Security Company of New Haven, of which he was the local agent, and delivered that policy to Mr. Lathrop. That company declined to carry it, and ordered cancellation. Bodwell so informed Lathrop, and that policy was surrendered and canceled. Upon the cancellation of the policy upon the furniture by the Security Company, Lathrop obtained a policy upon it in another company, which latter policy was in force at the time of the fire, which occurred March 25, 1898, and was paid. Bodwell returned the premium to Lathrop after the fire. Whether Lathrop returned it to plaintiff does not clearly appear. On June 10th, after the fire, plaintiff tendered to the defendant the amount of the premium, \$54. Lathrop testified that none of these policies were delivered to Mr. Kooistra. Mr. Kooistra testified that the policy in suit was delivered to him; that he retained it in his possession about a week, and then returned it to Lathrop for the

purpose of procuring insurance upon the furniture. Mr. Kooistra also testified that he knew nothing about the issuance and cancellation of the other policies. The court left it to the jury to determine whether Lathrop had authority to accept notice of cancellation, to waive five days' notice required by the policy, and to surrender it; instructing them that,—

“If Mr. Kooistra instructed Mr. Lathrop to keep trying to get insurance until he found some company that would carry it, then Lathrop became the agent of the plaintiff, and notice of the cancellation of the policy given by the defendant to him was sufficient notice, and when he surrendered the policy to Bodwell it ended the liability of the defendant thereon.”

Plaintiff recovered verdict and judgment.

Howard, Roos & Howard, for appellant.

M. B. Butler, for appellee.

GRANT, J. (*after stating the facts*). Was the policy legally canceled? It is conceded that authority to procure insurance does not imply authority to consent to cancellation. This is well settled, and the citation of authorities is unnecessary. Lathrop was the agent of plaintiff. He was at no time and in no sense the agent of the defendant. She had no contract with Lathrop for insurance in any particular company. The fact that Mr. Lathrop had delivered the policy to Mr. Kooistra, who had returned it, is of no consequence. The possession of the policy, under the circumstances, was sufficient to justify Bodwell in believing that Lathrop had authority to surrender it, and that it was under his control. Lathrop and Bodwell both understood that it was doubtful if the defendant would carry the insurance. It was entirely natural that the policy should remain in Lathrop's possession until the company had determined whether it would carry or cancel it. It was evidently contemplated that Bodwell, on hearing from the defendant, should notify Lathrop. When Bodwell did so, he found the policy in Lathrop's posses-

sion. Delivery to the plaintiff by Lathrop was not essential to the validity of the policy. It was as valid in the possession of Lathrop as it would have been in the possession of plaintiff or her husband. If a fire had occurred before surrender and cancellation, the defendant would have been liable, unless it was avoided by the existence of the first policy. It therefore follows that the first policy, issued by the Continental Company, was a valid one, unless it was legally canceled. Lathrop was clothed with no more authority to surrender than for cancellation than he was to surrender the one in suit. It must follow, under plaintiff's theory, that the first policy was in force at the time of the fire. Four policies had been issued, surrendered, and canceled while they were in the agent's possession. Can plaintiff have her choice as to which one of these is valid? If the first was valid, all the others are void. Furthermore, she ratified the act of her agent in surrendering the policy upon the furniture procured through Mr. Bodwell. Was Lathrop her agent to surrender one policy, and not the other? The law will not permit her to say, "Lathrop was my agent to surrender one policy, but was not my agent to surrender another," under precisely the same state of facts. She left the policy in the hands of her agent, and thus placed it in his power to mislead the defendant, who acted in good faith in canceling the policy. If Mr. Lathrop failed to notify plaintiff, this is no fault of the defendant. By leaving the policy with her agent, she placed it in his power to mislead the defendant. If both parties are innocent, it is her act which has misled, and she must be the sufferer.

There is no substantial dispute as to the material facts in the case. It therefore became a question of law for the court. We think the court should have directed a verdict for the defendant.

The judgment is reversed, and, inasmuch as no different case can be made upon a new trial, none will be ordered.

HOOKEE, MOORE, and LONG, JJ., concurred with GRANT, J. MONTGOMERY, C. J., concurred in the result.

DICKERSON v. CORNING.

MORTGAGES—DEFICIENCY DECREE—BILL OF REVIEW—SERVICE OF PROCESS.

One against whom a decree for a deficiency passes in foreclosure proceedings, the officer having made return that he was served with process, may on bill of review, when it appears that he was not so served, be given an opportunity to make defense; but the decree against him will not be disturbed on the ground merely that he had no opportunity to attend the sale and see that the property sold for its fair value, if it is not made to appear in fact that the property was sacrificed and that a resale is desired.

Appeal from Midland; Dodds, J. Submitted January 3, 1900. Decided January 23, 1900.

Bill of review by Freeman B. Dickerson against Edward Corning and Anna Corning, executors of the last will and testament of William Corning, deceased. From a decree for defendants, complainant appeals. Affirmed.

Walker & Spalding, for complainant.

Camp & Brooks and *William G. Gage*, for defendants.

GRANT, J. For a statement of this case, see *Corning v. Burton*, 102 Mich. 86, 96. After it was remanded to the court below, Mr. Dickerson filed a bill of review. Defendants answered, and the case was heard upon pleadings and proofs taken in open court. The court held that Mr. Dickerson was not served with the subpoena, and had no knowledge or notice of the foreclosure proceedings until he was served with a petition for execution for the deficiency; that the land was not sold at the foreclosure sale for less than its actual value; that it does not appear that a greater sum would be realized upon another sale; and that Mr. Dickerson was liable for the deficiency. His

counsel now insist that if the court below reached the correct conclusion upon the evidence, that he was not served with process, the decree as to him is absolutely void, and he is discharged from his obligation to pay. The complainants in the foreclosure suit relied upon the return of the sheriff that he had served the subpoena upon Mr. Dickerson. They had the right to act upon that return, and are guilty of no neglect of duty. It would be a harsh and unconscionable rule which would deprive them of any of their legal rights because of the mistake of the officer. While there are authorities which hold that the return of the officer is conclusive after judgment or decree, we think the better rule is that the defendant may appear in the same proceeding by motion to set aside a judgment, or by a bill of review to set aside the decree and sale, and thus give him the opportunity to make a defense to the suit. There are many authorities in support of this rule. A party cannot otherwise be held to have had his day in court, to which every litigant is entitled. It conclusively appears that Mr. Dickerson has had this opportunity, and has been permitted to introduce any defense that he might have. He has made no defense upon the merits. He has therefore suffered no injury. The defendants offered to transfer the entire mortgaged property to him upon payment of the mortgage debt. They have acted equitably and justly with him. It would be inequitable, under these circumstances, to permit him to escape all liability. Counsel, when asked upon the hearing of what right Mr. Dickerson had been deprived, replied that he was entitled to notice of the proceedings, so that he might attend the sale and see that the property sold for its fair value. He does not ask for a resale. There would be much force in this claim if it appeared that the property sold for less than its value, and he now asked for a resale. We are cited to no authority which holds that, where judgments and decrees are set aside in direct proceedings for failure to serve process, the defendant is held to be discharged. He has obtained all the rights to which he was entitled when he has

been permitted to appear and interpose his defense. He could have done nothing more if he had been served with process.

There are other interesting questions in the case, but this disposal of it renders their discussion unnecessary. We think the decree of the court was correct, and it is affirmed.

The other Justices concurred.

LEPPALA v. CLEVELAND IRON-MINING CO.

MASTER AND SERVANT—ASSUMED RISK — CONTRIBUTORY NEGLIGENCE.

Where a mining company had provided a suitable and safe platform for its employes to stand on when engaged in barring down ore, which would become clogged in the chutes constructed to discharge the ore into ore cars, an experienced workman who, without being authorized or directed to do so, climbed into one of the cars for the purpose of performing that duty, was guilty of negligence, and assumed the risk of being injured by contact with a trolley wire overhead.

Error to Marquette; Stone, J. Submitted January 5, 1900. Decided January 23, 1900.

Case by John Leppala, administrator of the estate of Daniel S. Leppala, deceased, against the Cleveland Iron-Mining Company, for negligently causing the death of plaintiff's intestate. From a judgment for defendant on verdict directed by the court, plaintiff brings error. Affirmed.

Plaintiff's decedent was a miner, and at the time of his death had worked in the defendant's mine two years. It

is claimed that he was killed by coming in contact with a trolley wire used in conveying cars loaded with ore along the levels of the mine to the shaft, where the ore was dumped from the cars into skips, and hauled to the surface. The situation, the method of doing the work, and the circumstances under which the deceased died, are so well and concisely stated in the brief of Mr. Wood, one of the attorneys for defendant, that we adopt his statement:

"At the time this accident occurred, the deceased was filling cars on the second level, at raise No. 2. The ore was deposited in the raise above, and came down, through a chute, into cars standing beneath. When the car was full, it was hauled to the shaft on rails by means of an electric motor, and taken to the surface in skips. At the chute where the accident occurred, there was a ladder-way going from the level to the drift above, and so constructed that it passed alongside of the chute. The chutes were constructed with holes in the sides, so that, when clogged with ore, the men loading cars could go upon the ladder, and, using an iron bar, pry the ore loose, so that it would run through the chute into the cars below. The level running from the shaft, at the point where the accident occurred, was 7 feet wide and $7\frac{1}{2}$ or 8 feet high. The rails ran in the center of the level. The cars used to carry the ore to the shaft were 4 feet wide, 6 feet long, and 4 feet high, and stood 6 inches above the rails. Directly above the center of the tracks ran the trolley wire, which was 6 inches from the top of the level. This wire furnished the power to haul the cars to the shaft. Directly across the tracks from the chute was a platform running alongside the car, 18 inches high, provided by the company for the men to stand on when barring the ore at the mouth of the chute. At the time of the accident, the deceased was barring down ore from the chute into the car. The car was about half full of ore at the time. The chute had become clogged, and the deceased was trying to make the ore run. He climbed upon the ladder, and tried to bar from there, but was unable to start the ore. Coming down from the ladder, he came around in front of the chute to bar in the mouth of the chute, and, instead of getting on the platform provided for the purpose, he climbed into the car, inserted the iron bar in the chute, and commenced to bar. In so doing he raised his head,

and came in contact with the trolley wire overhead, and received a shock, which, it is alleged in the declaration, was the cause of his death."

The negligence charged is the failure to—

"Make the wire safe by locating it above the reach of the employes while engaged about their work, to properly cover and insulate the said wire, and to inform the deceased and the other employes working in the said mine and drifts and stopes of the danger incurred by taking hold or touching the said unprotected wire."

The court directed a verdict for the defendant.

Clark & Pearl, for appellant.

George Hayden and James C. Wood, for appellee.

GRANT, J. (*after stating the facts*). The reasons given by the court for his directions were that no negligence was shown on the part of the defendant, and no damage to the plaintiff. The voltage used was 220. Other plants like this had been in operation in other mines for several years, some of them having a voltage of 500. No accident had ever happened. Workmen had frequently come in contact with this and other wires, receiving a shock which did no harm. No instance is shown where any contact with a voltage of 220 had resulted in injury. It is urgently insisted that the testimony fails to show that death was caused by contact with the wire. Deceased was only a few months past 21 years of age. There was no evidence that he had contributed anything to the support of his father. We, however, do not choose to base our decision upon either of these questions. We think it clear that the deceased, when he got into the car to bar down the ore, assumed the risk, and was guilty of contributory negligence. The sides of the car sloped towards the center. The danger of doing this work in the car is apparent, and is clearly shown by the testimony, because of the danger of being struck by the ore when it started to run. The defendant had provided suitable and

safe places for its employés to stand in barring down the ore. The deceased had never been authorized or directed to get into the car for that purpose, and no custom to so do was shown. For this reason the judgment must be affirmed.

The other Justices concurred.

CAPLE v. SWITZER.

MORTGAGES—DESCRIPTION OF PROPERTY—EXCEPTIONS—AFTER-ACQUIRED TITLE—COVENANTS OF WARRANTY.

Though a deed excepting from the grant "a part assigned to a widow as her dower interest" be construed as excepting the fee of the part assigned, and not merely the widow's life estate, if the grantee mortgages the entire land "except the life estate of the widow," title subsequently acquired by him from the remainderman will inure to the mortgagee, under covenants of warranty contained in the mortgage.

Error to Gratiot; Daboll, J. Submitted January 5, 1900. Decided January 23, 1900.

Ejectment by John S. Caple and Andrew J. Hall against John S. Switzer and Elizabeth Switzer. From a judgment for plaintiffs, defendants bring error. Affirmed.

One Patrick Egan died intestate, seised of the N. $\frac{1}{2}$ of the N. E. $\frac{1}{4}$ of section 12, town 12 N., of range 4 W., in Gratiot county, leaving a widow and seven children. Due proceedings were had by which the estate was partitioned; a small piece, the subject of this suit, being assigned to the widow as her dower estate. Subsequently the defendants acquired the interests of all the heirs, except one. The deeds conveying these interests contained the following description:

"The north half of northeast quarter of section twelve, town twelve north, of range four west, less all that part assigned by the probate court of Gratiot county, Michigan, to Bridget Egan, widow of Patrick Egan, as her dower interest in and to said premises; also, less that part assigned to Martin Egan by probate court of Gratiot county, Michigan, as heir at law of said Patrick Egan. This deed is intended to convey sixty-two and one-half acres of land, more or less. Also, less one and twenty-eight one-hundredths acres off north side, for cemetery."

The defendants executed a mortgage to one John Flannigan, which Flannigan assigned to Josephine Flannigan. The mortgage contained the following description:

"The north half of northeast quarter of section twelve, town twelve north, of range four west, except the life estate of Bridget Egan, widow of Patrick Egan, in that part assigned to her by the probate court of said county as her dower interest, and also excepting that part assigned by said probate court to Martin Egan as heir at law of said Patrick Egan, and also excepting one and 28-100 acres on north side heretofore conveyed for cemetery purposes; and also excepting Martin Egan's residuary interest in Bridget Egan's dower."

The mortgage was foreclosed, the time of the redemption expired, and Josephine Flannigan deeded the land to the plaintiffs. Some time after executing this mortgage, defendant John obtained the title to the piece of land in dispute. Plaintiffs brought this suit in ejectment to recover possession, claiming title by virtue of the foreclosure proceedings and deed thereunder. Defendants insist that the piece of land was not covered by the mortgage, and that the after-acquired title did not inure to the benefit of the mortgagee and his grantees. The court below found that the mortgage covered the land in dispute, subject to the life estate of the widow, and that, she being dead, plaintiffs had title thereto.

J. Lee Potts, for appellants.

George P. Stone (*Kelly S. Searl*, of counsel), for appellees.

GRANT, J. (*after stating the facts*). Whether the expression in the deeds, "less all that part assigned by the probate court of Gratiot county, Michigan, to Bridget Egan, widow of Patrick Egan, as her dower interest in and to said premises," excepts the fee of the land, or only the widow's life estate, may be doubtful. Four months after defendants obtained their title, they executed the mortgage, by which they mortgaged the entire land, "except the life estate of the widow." This might fairly be construed as a construction by the defendants of the language of the deeds. But, whether this be so, the mortgage clearly covered the land, subject to the life estate. The title thereto subsequently acquired by the defendants inured to the benefit of the mortgagee and his grantees, under the covenant of warranty contained in it. *White v. Smith*, 37 Mich. 291; *Gray v. Franks*, 86 Mich. 382. Judgment affirmed.

The other Justices concurred.

UHL v. WEIDEN.

EXECUTION—LIEN—RECORDING LAWS—RESULTING TRUST—AGENCY.

3 Comp. Laws 1897, § 9224, providing that the lien of a levy of execution shall, after the filing of notice with the register of deeds, be valid against "prior grantees" of whose claims the execution creditor had no notice, does not enable an execution creditor to obtain by his levy superior rights in land the title to which was taken by the debtor in his own name without authority from the real purchaser, as whose agent he was acting, even though the owner delays until after the levy the recording of a deed from the agent to himself, which, upon learning the facts, he caused to be executed, since, independent of his title as grantee under such deed, he has an enforceable title by virtue of 3 Comp. Laws 1897, § 8837, which provides that a trust shall result in favor of the person furnish-

ing the consideration for a deed when the alienee therein takes title in himself without the knowledge or consent of such person.

Appeal from Kent; Grove, J. Submitted January 5, 1900. Decided January 23, 1900.

Bill by David E. Uhl against Hubert Weiden and others to remove a cloud from title, and to correct a description in a deed. From a decree for complainant, defendants appeal. Affirmed.

Frank W. Hine, for complainant.

Henry J. Felker, for defendants.

HOOKEK, J. On July 16, 1898, the complainant had a contract for the purchase of certain lots in Grand Rapids from the Kent County Savings Bank, and had employed one Herrington, a real-estate dealer of that city, to negotiate sales of the same. Henderson and wife owned some lots, upon which they resided, and Herrington negotiated a trade between them and the complainant, Uhl, who accepted a proposition to trade some of his lots for the Henderson property, and authorized Herrington to make the trade. He caused the Kent County Bank to make a deed to him, and he executed a deed to the Hendersons. He directed Herrington to deliver this, and take a deed for the Henderson property. Herrington took this deed to himself, instead of to Uhl, without the latter's knowledge, explaining it by saying he wanted it to appear that he was doing a large business, and that he was in the habit of taking deeds to himself under similar circumstances, and then deeding to his principal, which he would do in this case, and which he did. The deed to Herrington was immediately recorded, by Uhl's direction, while the deed to Uhl was not placed of record until July 23, 1898. Meantime the other defendants, who had a judgment against the Herringtons, levied an execution upon the land, and caused the notice provided for by statute (3 Comp. Laws

1897, § 9224) to be filed. The complainant's bill is filed to remove the cloud upon his title caused by the levy, and incidentally to correct the description in the deed from Herrington, which described the land as "lot one, and the west twelve feet of lot of Gerritt Dupree's addition," instead of "lot one, and the west twelve feet of lot *two*, of Gerritt Dupree's addition."

The statute (section 9224) is as follows:

"*The People of the State of Michigan enact*, That no levy by execution on real estate, made after this act shall take effect, shall be valid against *bona fide* conveyances made subsequent to such levy, until a notice thereof, containing the names of the parties to the execution, a description of the premises levied upon, and the date of such levy, shall be filed by the officer making the same in the office of the register of deeds of the county where the premises are situated, and such levy shall be a lien thereon from the time when such notice shall be so deposited; and the lien thus obtained shall, from the filing of such notice, be valid against all prior grantees and [mortgagees] mortgages of whose claims the party interested shall not have actual nor constructive notice."

By taking title to himself, Herrington perpetrated a legal fraud upon Uhl, though it appears to have been accompanied by no design to wrong or injure him. Had this levy been filed at once, before Uhl learned of Herrington's action, or before he had an opportunity to protect himself by legal proceedings and *lis pendens*, we should doubt the efficacy of this statute to give the levy priority over Uhl's title. Indeed, he would not be within the letter of the statute, for in such case it could not be said that he was a grantee of Herrington. It follows that the entire support for defendants' claim is the fact that complainant took a deed from Herrington,—thus becoming his grantee in a technically legal sense,—instead of resorting to a court of justice to compel the declaration of a trust in his favor and a conveyance of the estate. It would seem that the law should permit the voluntary conveyance which it would otherwise compel, and that the

complainant should not be permitted to lose, or the defendants to gain, by a laudable act upon the part of Herrington, having for its object the conveyance of a naked legal title to one who had already the right to every substantial interest in the property conveyed. 3 Comp. Laws 1897, § 8837; *Connolly v. Keating*, 102 Mich. 1, and cases cited.

It is urged that the act of Herrington in taking the deed to himself was ratified by the complainant; but we are not impressed by this contention. It is obvious that he never intended that Herrington should take title; but, after he had taken it without his consent, and against his rights, he permitted him to take the shortest method of correcting the wrong. What force there is to the defendants' claim is due to complainant's neglect to record his deed for a few days; and had the levy been followed by a sale, and had the land fallen into the hands of a *bona fide* purchaser for value, it is possible that this delay might have proven fatal to the complainant's claim under other statutes. But here there is no *bona fide* purchaser for value, but an execution creditor, who has lost nothing, insisting upon applying the property of A. to the payment of his claim against B. Under some circumstances this statute might require this, but its application should not be enlarged by construction. So far as the naked legal title is concerned, this deed may be declared void as against the levy; but the complainant has a better and underlying title, one not created by this deed nor affected by it, and one not within the letter nor the spirit of the statute. He is in a different position from a purchaser from Herrington, taking title under the deed from Herrington only. Wipe out his deed, and he still has a superior claim. The case of *Hawkins v. Willard*, (Tex.) 38 S. W. 365, is substantially like the present case, and it was held that the recording act did not apply.

It is claimed that the record shows that Herrington concealed from Henderson Uhl's connection with the transaction for fraudulent purposes, and that this was

the reason that the deed was taken to Herrington. Henderson is not complaining, and, if he were, he, and not these defendants, should be relieved, if either. It is beyond controversy that this land was paid for by Uhl, and Herrington had no interest in it. The deed taken in his name was held in trust, under the statute cited, for complainant; and, if we are not wrong in our view of the law, that is decisive against the only defense that the defendants can make.

The decree is affirmed, with costs.

The other Justices concurred.

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FLYNN v. THIRD NATIONAL BANK OF DETROIT.

1. **BANKS—INSOLVENCY—NEGLIGENCE OF DIRECTORS—BILL FOR ACCOUNTING—PARTIES.**

A bill will lie in equity, on behalf of an insolvent bank, to compel the directors to account for losses sustained by reason of their negligent administration of the bank's affairs; and it may be brought by any shareholder, where the receiver is a director, and therefore a proper defendant to the bill.

2. **EQUITY PLEADING—DEMURRER—MULTIFARIOUSNESS.**

A bill in equity will not be held bad, on demurrer, for multifariousness, unless the defect is pointed out in the demurrer.

3. **SAME.**

A general demurrer to a bill cannot be sustained where there is matter in the bill upon which any equitable relief can be granted.

Appeal from Wayne; Lillibridge, J. Submitted January 9, 1900. Decided January 23, 1900.

Bill by James W. Flynn against the Third National Bank of Detroit, Joseph L. Hudson, individually and as

receiver of said bank, and others, directors therein, for an accounting. From an order overruling a demurrer to the bill, defendants appeal. Affirmed.

Charles S. McDonald (*Edwin F. Conely*, of counsel), for complainant.

De Forest Paine and *Wisner & Harvey*, for defendants.

HOOKER, J. The Third National Bank of Detroit went into the hands of a receiver, appointed, as is usual in such cases, by the comptroller of the currency, about February 1, 1894. Joseph L. Hudson, a shareholder and director, was named receiver. The bank is said to have been hopelessly insolvent, and the shareholders have since been assessed to an amount equal to 84 per cent. of its capital stock. The complainant in this suit was one of the shareholders, and his bill is filed, on behalf of himself and other shareholders, against the receiver and others, who at various times held the office of director while the bank was doing business, alleging that the loss of the assets of the bank and its insolvency are due to their neglect and maladministration of its affairs. The bill prays that the several defendants be adjudged responsible for the consequent losses to the complainant and other shareholders, and that the amount for which each should be held liable be determined, and the defendants be decreed to pay such amounts to a receiver to be appointed by the court for the benefit of the shareholders, creditors, and others entitled thereto. The bank, its directors, and the receiver are made parties defendant. Three have answered. The others have demurred. The questions raised are:

1. Want of equity in the bill.
2. That the liability alleged is an asset of the bank, which would go to the present receiver, who is not subject to the jurisdiction of the court in respect to the management and disposition of such assets.

The bill charges, among other things, that the defend-

ants' negligence in the management of the affairs of the bank made its ruin possible, and that it would have been prevented had they been diligent; that they willfully or negligently permitted the money of the bank to be fraudulently converted, wasted, and squandered, and permitted irresponsible and insolvent persons to overdraw their accounts, and to borrow money without adequate security, whereby large sums were lost, and knowingly or negligently permitted the withdrawal of a portion of the capital stock by paying dividends in excess of the earnings; that, through their negligence, the cashier was able to abstract and misapply the funds of the bank, etc. Many other allegations of negligence are found in the bill. Some of them are even more general than these, while others are not shown to have caused or contributed to the loss of the property of the bank. Some of those first mentioned we consider sufficiently specific, under the circumstances of the case. The case of *Loud v. Winchester*, 64 Mich. 23, is in point, where it is said:

"In an action for an accounting by a trustee for the alleged maladministration of the trust, it is not reasonable to require the complainant to set out in his bill the misdoings which he could not be expected to fully understand until he had obtained disclosures, the beneficiaries not being generally presumed to possess such knowledge from independent sources. In such a suit, any testimony throwing light on the trustee's management of the trust bears directly on the performance of this duty, and may be considered in taking the account and in determining the view to be taken of the conduct of the trustee."

We find it unnecessary to discuss the degree of negligence which will justify a court in holding directors of a bank liable for losses. It is enough to say that the bill charges negligence in various things, and that loss resulted therefrom. That an action for such negligence may be brought on behalf of the bank we have no doubt, and that ordinarily it should be brought by the receiver is admitted. Here, however, the receiver is a director and a defendant. In cases where a receiver refuses to bring an action, it

may be brought by shareholders on behalf of the bank; and we think that, where the receiver is chargeable with other directors, it cannot be supposed that he would bring an action against himself, and his refusal should not be a prerequisite to the filing of a bill. See *Brinckerhoff v. Bostwick*, 88 N. Y. 52, 99 N. Y. 185, 105 N. Y. 567; *Barr v. Railroad Co.*, 125 N. Y. 272; *Ettlinger v. Carpet Co.*, 142 N. Y. 193 (40 Am. St. Rep. 587); *O'Brien v. Fitzgerald*, 143 N. Y. 377; *Sage v. Culver*, 147 N. Y. 246; *Leslie v. Lorillard*, 110 N. Y. 519 (1 L. R. A. 456); *Hawes v. Oakland*, 104 U. S. 450; *Bengley v. Wheeler*, 45 Mich. 493.

It is urged that the bill is multifarious, but no such defect is pointed out in the demurrer. The rule is settled that a general demurrer cannot be sustained where there is matter in the bill upon which any equitable relief can be granted.

The decree of the circuit court is affirmed, with costs, defendants to have the usual opportunity to answer.

The other Justices concurred.

MONJE v. CITY OF GRAND RAPIDS.

1. PERSONAL INJURIES—MUNICIPAL CORPORATIONS—PRESENTATION OF CLAIMS.

A charter provision requiring persons claiming damages from a city for personal injuries to furnish the common council with the names of witnesses within a stated time after the injury occurred imposes no duty upon the claimant to produce such witnesses before the council.

2. SAME—DEFENSES—PROXIMATE CAUSE.

In an action against a city for injuries sustained by falling into an unguarded excavation at night when attempting to board a street car, the city cannot escape liability upon the

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124	95

122	645
126	311

122	645
881	574
129	25

122	645
e136	182
j136	190

122	645
137	96
137	100
137	323

122	645
158	280
j158	282

ground that the company's negligence in stopping the car so near the excavation was the proximate cause of the injury.

3. SAME—DEFECTIVE STREET—LIABILITY OF CITY

A city being, under its charter, responsible for constructing sewers and their connections, it is liable for injury to one falling into a trench for a sewer connection negligently left uncovered, though the work was done by a licensed plumber, who alone had notice of the defect.

Error to superior court of Grand Rapids; Burlingame, J. Submitted January 9, 1900. Decided January 23, 1900.

Case by Elizabeth Monje against the city of Grand Rapids for personal injuries. From a judgment for plaintiff, defendant brings error. Affirmed.

L. K. Salisbury, for appellant.

Carroll, Turner & Kirwin, for appellee.

HOOKER, J. The defendant appeals from a judgment against it in an action for a personal injury. Our understanding of such facts as are important to the consideration of the questions before us is that upon Ottawa street, running north and south, a trench was opened for some distance, for the purpose of repairing a sewer, by a contractor named Owens, who seems to have no interest in this case. A trench, extending from abutting property upon the east side of the street to the sewer, had been opened for the purpose of making drain connections. This was done by a plumber, Van Rossum, who was licensed by the city. There were two street-car tracks upon this street, the easterly one only being in use that day. The intersecting trench opened by the plumber was open between the two tracks. A car came from the south, and stopped opposite this trench, a short distance north of Mason, an intersecting street. It was an open car, with a running-board upon its side. The plaintiff came from the southwest, and, instead of taking the cross-walk to the east side of the tracks, took a diagonal course northeasterly, directly

towards the car, and attempted to board it on the west side, but fell into the trench between the tracks, whereby she was injured. It was in the night, and there is some testimony that indicates that the lights were not burning in the car.

Among the alleged errors are the following:

1. That plaintiff did not comply with the requirements of the charter in regard to the presentation of claims, and therefore the court erred in refusing to direct a verdict for the defendant.

2. That it was negligence in the car company to stop its car near the hole, instead of nearer Mason street, and therefore that the unguarded trench was not the proximate cause of the injury, and that the court erred in declining to so direct the jury.

3. The charter provides that the board of public works shall have power to license plumbers, and Van Rossum was licensed by them; and it is contended that this did not make the city responsible for the plumber's negligence in leaving an open, unlighted trench.

4. It is maintained that, unless Van Rossum can be said to have acted as the city's agent, there was no notice of the dangerous condition of the way.

5. The contract and bond of Owens were admitted in evidence, and it is alleged that this was erroneous.

6. It is said that the jury should have been directed to render a verdict for defendant upon the ground of plaintiff's contributory negligence.

Sections 6 and 7 of title 4 of the charter (Act No. 374, Local Acts 1897) provide:

“SEC. 6. If any claim for unliquidated damages is made against said city for injuries to persons or property by reason of any defect in sidewalks, streets, highways, cross-walks, bridges, alleys, courts, or public grounds or places in said city, or any claim is made against said city in an action of tort, the claimant in such cases shall present the same to the common council within sixty days after the injury or wrong occurred, which claim shall state the place where the injury or wrong was received, the names of the claimant's witnesses concerning the same then known to the claimant, a description of the injury sustained, and a succinct statement of the facts

constituting such claimant's demand against said city, and any further statement that may be required by said common council; and any such claim shall be void unless such claimant shall bring an action against said city for such demand within a period of one year from and after said common council has had a reasonable time to investigate and pass upon such claim, which reasonable time shall not exceed a period of thirty days.

"SEC. 7. It shall be a sufficient bar to any action or proceeding brought in any court for [the] recovery of any such claim against said city, that such claim has never been presented to the common council, or has not been presented within the time above limited, or that the action or proceeding was brought before said common council had such reasonable time to investigate and pass upon such claim, as hereinbefore stated, or that such action or proceeding was not brought within the period of one year after the time elapsed for the common council to investigate and pass upon such claim, as hereinbefore stated."

It appears that the plaintiff filed a written claim, duly verified, stating the facts at length, giving the names of a number of persons alleged to be her witnesses concerning the injuries. Her counsel, husband, and son met and discussed the subject with the committee of the common council, who laid the matter over a week; and, according to the statement of a member of the committee, the plaintiff's counsel was to produce further witnesses of the transaction, but they were not produced, and subsequently the action was commenced. The claim was filed September 7th, and action was commenced late in October. We are of the opinion that the plaintiff did all that was required of her by law.

The doctrine of proximate cause has, in our opinion, no application under the facts proved. It is true that, if the car had been somewhere else, she would not have gone near the open trench; but it would be difficult to imagine a case where one would fall into a trench but for the fact that some other circumstance led him to go near enough to fall into it.

The city has the responsibility of constructing sewers

and their connections, under the charter, whether it be done by its own employés, or by persons licensed to dig up its streets. Thus, in *Hayes v. City of West Bay City*, 91 Mich. 418, it was so held where a building was being moved under supervision of the city; and again in *Joslyn v. City of Detroit*, 74 Mich. 458. In *Gavett v. City of Jackson*, 109 Mich. 414 (32 L. R. A. 861), the distinction between the cases where the city is, and those where it is not, an active agent in causing danger, is alluded to; citing the case of *Hutchinson v. City of Ypsilanti*, 103 Mich. 12, where it was pointed out. In *Baker v. City of Grand Rapids*, 111 Mich. 447, Mr. Justice MONTGOMERY alluded to *Southwell v. City of Detroit*, 74 Mich. 438, stating that the rule is there laid down "that a city, when performing a duty imposed upon it by law, cannot shift the responsibility for conditions created by itself in the performance of such duty upon a contractor, and rid itself of its obligations." *Hamilton v. City of Detroit*, 105 Mich. 514. These cases seem to us to dispose of the claims that the city was not responsible for the act of the plumber, and that it had no notice of the defect.

The testimony in relation to Owens, if inadmissible, was harmless.

The question of contributory negligence was for the jury; such negligence not being, in our opinion, conclusively proved.

It remains to say that we find no error, and the judgment is affirmed.

The other Justices concurred.

MERCHANTS' NATIONAL BANK OF TOLEDO v. BARRETT.

GARNISHMENT—ASSIGNMENT—INDEBTEDNESS.

P., the owner of a lumber contract worth \$1,000 and upwards, assigned the same, for a consideration of \$10, to B., who took it subject to the claim of M. After being served with garnishee process, B. assigned the contract to M., who repaid the \$10, and credited the amount realized from the lumber upon his claim against P. *Held*, that B. was improperly held liable as garnishee of P.

Error to Kent; Grove, J. Submitted January 9, 1900.
Decided January 23, 1900.

Garnishment proceedings by the Merchants' National Bank of Toledo, Ohio, against William E. Barrett, as garnishee of James A. Panting. From a judgment for plaintiff, defendant brings error. Reversed.

This case was tried before the court without a jury, and the following findings made:

"1. December 16, 1895, Dennis Bros., of Grand Rapids, Mich., who were then the owners of a certain quantity of lumber situated at Manton, Mich., sold said lumber to the J. S. Eck Company, of Toledo, Ohio, for \$4,315.79. The J. S. Eck Company paid down on the purchase price \$2,000. James A. Panting, principal defendant, afterwards purchased the interest of the J. S. Eck Company in the lumber. February 18, 1896, Dennis Bros. made a written contract with defendant Panting, by the terms of which C. S. Bacon & Co., of Grand Rapids, were to sell said lumber on a commission of 50 cents per thousand, and out of the proceeds to pay the remainder of the purchase price due Dennis Bros., and the balance to defendant Panting. March 3, 1896, said contract between Dennis Bros. and defendant Panting was assigned in writing, indorsed thereon by defendant Panting, to garnishee defendant, William E. Barrett; and at the time the affidavit for the writ of garnishment against said garnishee defendant,

William E. Barrett, was made, and said writ of garnishment was issued and served, namely, the 25th day of March, 1896, said garnishee defendant held said contract by virtue of said assignment.

"2. At the time said assignment was made to said garnishee defendant, said principal defendant applied to said garnishee defendant for a loan of \$10, and offered said contract as security. Said garnishee defendant paid said principal defendant \$10 at that time, and took said assignment.

"3. At the time said assignment was made, said contract was worth the sum of \$1,088.64, after the payment of the balance due on the purchase price.

"4. At the time said assignment was made, said principal defendant was indebted to the plaintiff in the sum of \$942.27 on three promissory notes made by said principal defendant, by the name of James A. Panting & Co., payable to the order of the J. S. Eck Company. Said principal defendant was also indebted to the Mathias Planing-Mill Company, of Dayton, Ohio, to the amount of \$2,100 or over.

"5. Subsequent to the 25th day of March, 1896, while the said contract was in the possession of the said garnishee defendant, Barrett, the principal defendant agreed with the Mathias Planing-Mill Company to assign said contract to it, to apply on his indebtedness to said company, with the understanding that, if the money realized from the sale of said lumber was more than sufficient to pay such indebtedness, the surplus should be paid to said principal defendant; and on the 15th of May, 1896, said garnishee defendant assigned said contract to the Mathias Planing-Mill Company, and received therefor \$20,—being the \$10 which he had loaned to said principal defendant, and \$10 which he had expended for attorney's fees on account of this suit.

"6. The Mathias Planing-Mill Company realized from the sale of said lumber, after paying the balance of the purchase price due Dennis Bros., and all expenses of the sale and handling, the sum of \$1,088.64, which the said Mathias Planing-Mill Company credited to the said Panting upon its claim against him of \$2,100 and over, in pursuance of its agreement between it and the said Panting.

"7. James A. Panting did business under the name of James A. Panting & Co. He had no partner. The firm of William E. Barrett & Co. consisted of William E. Barrett alone.

"8. Said garnishee defendant was not a *bona fide* purchaser of said contract for value, but, at the time said writ of garnishment was sued out and served, held said contract as security for a loan of \$10, which was subject to payment, and which has since been paid; and he is therefore liable to the plaintiff, as garnishee defendant, for the value of said contract, namely, the sum of \$1,088.64."

Exceptions are taken to the finding of facts. If the finding of facts is erroneous, the finding of law must fall.

Dunham & Dunham (*George P. Wanty*, of counsel),
for appellant.

Hatch & Wilson, for appellee.

GRANT, J. (*after stating the facts*). The theory of the plaintiff is that defendant Barrett had property, moneys, goods, chattels, credits, or effects in his hands or under his control belonging to the principal defendant, Panting. It is also the theory that the assignment by Panting to Barrett was merely as a mortgage security. If it be conceded that this was a mortgage arrangement, and that Barrett might be held for whatever property should come into his hands under the assignment, still Barrett would not be liable, provided his security was made subject to the claims of the Mathias Planing-Mill Company. The mortgagee or other security holder cannot be held liable as garnishee until he has foreclosed his security, and received either the property or money in excess of the money loaned. Whether Barrett could be held liable as garnishee if he held the contract as security merely, we need not discuss; for we are clearly of the opinion that Mr. Barrett was a *bona fide* purchaser of this contract, subject to the claims of the Mathias Planing-Mill Company and Dennis Bros. It is undisputed that these two claims amounted to more than the value of the property, or what was realized from the sale thereof under the contracts. Mr. Barrett made disclosure that he had no property in his hands belonging to Mr. Panting, and that he was not indebted to him. Subsequently Mr. Barrett

was made a witness for the plaintiff. Mr. Barrett testified positively that he paid Panting the \$10 in absolute purchase of the contract, subject to these claims. In this he is corroborated by the only other witness who was present when the arrangement was made. The assignment was made in March, and Panting was preparing to go to Panama or South America, and went shortly after the assignment, and before service of the garnishee process. He knew that there could not be much, if anything, left in the contract after these two claims were paid. He offered to sell the residue for \$10, and Barrett purchased. Whether or not there was an absolute, written assignment to the Mathias Planing-Mill Company prior to the assignment to Barrett, is immaterial. If Panting informed Barrett that his assignment was subject to that claim, and he purchased with that understanding, Barrett was justified in taking it subject thereto, and it would not affect the validity of his purchase. He had a right to agree that the debt of the Mathias Planing-Mill Company should be paid before he was entitled to anything under his assignment. It is true that the assignment from Barrett to the Planing-Mill Company is dated subsequent to the assignment by Panting to Barrett, and subsequent to the service of the garnishee process. But, if this was done by virtue of a prior agreement,—and we think the evidence clearly shows that it was,—it is valid. If defendant Barrett is not a *bona fide* purchaser, he is guilty of perjury. We do not think there is any substantial testimony in the case to contradict him.

Judgment reversed, and entered in this court for defendant Barrett.

The other Justices concurred.

122	654
134	291

KARREMAN v. KARREMAN.¹**DIVORCE—APPEAL—EVIDENCE.**

A decree of divorce, based on conflicting testimony taken in open court, was affirmed.

Appeal from Kent; Grove, J. Submitted January 11, 1900. Decided January 23, 1900.

Bill by Cora Karreman against Adrian R. Karreman for a divorce. From a decree for complainant, defendant appeals. Affirmed.

Wolcott & Ward, for complainant.

Gerrit H. Albers, for defendant.

MOORE, J. A bill for divorce was filed by complainant in this cause, charging extreme cruelty on the part of the defendant. The testimony was taken in open court, and decree rendered by the circuit judge in accordance with the prayer of the bill. The questions involved are purely questions of fact, the discussion of which would not profit any one. The trial court saw the witnesses. The decree is justified by the evidence, under the rulings of this court in the following cases: *Warner v. Warner*, 54 Mich. 492; *Hoyt v. Hoyt*, 56 Mich. 50; *Whitmore v. Whitmore*, 49 Mich. 417; *Briggs v. Briggs*, 20 Mich. 34; *Whitacre v. Whitacre*, 64 Mich. 232; *Cooper v. Cooper*, 78 Mich. 316; *De Zwaan v. De Zwaan*, 91 Mich. 279; *Nicholas v. Nicholas*, 50 Mich. 162; *Kirkland v. Kirkland*, 111 Mich. 166; *Bailey v. Bailey*, 121 Mich. 236.

The decree is affirmed, with costs.

The other Justices concurred.

¹ Rehearing denied May 2, 1900.

PRICE v. MARTHEN.

CONTRACTS—PAROL EVIDENCE.

One who signed, without reading, a contract which provided unconditionally for the purchase of a nickel-in-the-slot musical instrument, knowing that the contract was to be forwarded by the agent who took the order to the dealers, cannot show, in defense to an action for the price, a prior parol agreement between the agent and himself that he should take the instrument and operate it upon commission.

Error to Ogemaw; Sharpe, J. Submitted January 11, 1900. Decided January 23, 1900.

Assumpsit by Milbert F. Price and Willard F. Main, copartners as the Equitable Manufacturing Company, against William B. Marthen, for goods sold and delivered. From a judgment for defendant, plaintiffs bring error. Reversed.

Plaintiffs were partners, doing business under the firm name of the Equitable Manufacturing Company. Their business was the manufacture and sale of musical instruments known as the "American Musical Automaton." Their place of business was at Iowa City, Iowa. The sale was made through an agent. The contract was in writing, signed by both parties, and was executed in duplicate, —one sent by the agent to the company, and the other delivered to, and retained by, the defendant. The body of the contract was printed. The price was \$135. The instrument was put in operation by dropping a nickel in the slot. The contract was forwarded to the plaintiffs. The instrument shipped was received and placed in defendant's saloon, but, as he claimed, failed to work. He thereupon notified the plaintiffs by letter, and subsequently reshipped the instrument to them. He refused payment,

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s124	690
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and plaintiffs brought this suit in *assumpsit* to recover the purchase price. Attached to the plea of the general issue was a notice that the contract was obtained by fraud and false representations; that defendant was drunk and intoxicated, and in no condition to know what he was doing; that he did not know the contents of the contract, and did not read it; and that the machine was not as represented.

F. L. Snodgrass, for appellants.

Ross & Harris, for appellee.

GRANT, J. (*after stating the facts*). There is no testimony that defendant was intoxicated, or that there was fraud or false representation, unless it be that the agent represented to defendant that he could have the machine on commissions. Under the defendant's own testimony, all the talk about commissions was had before the contract was executed. The defendant had ample opportunity to read it. It was his own folly if he chose not to do so. It was not a long one. He knew that it was to be sent by the agent to the plaintiffs, to be acted upon by them. It contained definite terms of payment, and provided for an absolute sale. It was unambiguous. There was nothing in it about commissions. The law does not protect one against his own folly. The case is clearly within the rule of law that written contracts cannot be varied by evidence of prior or contemporaneous parol agreements. The court should have instructed the jury that the written contract in this case controlled.

Judgment reversed, and new trial ordered.

The other Justices concurred.

DAVIS v. BENEDICT.

DEEDS — ERRONEOUS DESCRIPTION — REFORMATION — SUBSEQUENT PURCHASERS.

Where a mortgagor's vendor owned only the N. W. $\frac{1}{4}$ of the S. W. $\frac{1}{4}$ and the S. E. $\frac{1}{4}$ of the S. W. $\frac{1}{4}$ of a section of land, but his deed to the mortgagor described the land as the N. W. $\frac{1}{4}$ and the S. E. $\frac{1}{4}$ of the S. W. $\frac{1}{4}$ of such section, and the mortgage, and a quitclaim deed thereafter given by the mortgagor to the mortgagee, contained the same description (the mortgagor having only taken possession of the two 40-acre tracts which his grantor in fact owned, and not having claimed title to any other lands, and the mortgage further stating that the description contained 80 acres), the mortgagor's grantor was entitled to have his deed reformed so as to describe correctly the land intended to be conveyed, and to have the last grantee enjoined from maintaining an action against him for breach of covenant, based on the failure of title to the N. W. $\frac{1}{4}$ of the section.

Appeal from Oakland; Smith, J. Submitted January 12, 1900. Decided January 23, 1900.

Bill by Daniel L. Davis against Ellen C. Benedict and W. Webb Seeley to reform a deed and to restrain the prosecution of an action at law. From a decree for complainant, defendant Benedict appeals. Affirmed.

Peter B. Bromley, for complainant.

Baldwin, Jacokes & Moore, for appellant.

HOOKE, J. Previous to May 29, 1888, Davis, the complainant, owned the N. W. $\frac{1}{4}$ of the S. W. $\frac{1}{4}$ and the S. E. $\frac{1}{4}$ of the S. W. $\frac{1}{4}$ of section 36 in township 2 N., range 8 E. He did not then or at any other time own the N. W. $\frac{1}{4}$ of that section. On the day mentioned, one Seeley purchased the two 40-acre parcels first mentioned, under-

standing that he was buying them, and no other land. The price agreed on was \$800, and this was paid down, \$780 of it being borrowed by Seeley upon the land. To convey the land to Seeley, Davis executed and delivered a deed substantially as follows: "Daniel L. Davis * * * conveys and warrants to the said W. Webb Seeley * * * all those certain pieces or parcels of land * * * described as * * * the northwest quarter and the southeast quarter of southwest quarter section thirty-six, * * * for the sum of fifteen hundred dollars." Seeley took possession of the two 40's, and no other land. On April 22, 1889, Seeley borrowed from the defendant Mrs. Benedict the sum of \$1,200, to secure which he gave her a mortgage containing the following description, viz.: "The northwest quarter and the southeast quarter of the southwest quarter of section thirty-six, * * * containing eighty acres, more or less." On June 12, 1891, Seeley wrote to the defendant that he was unable to pay the interest due upon her mortgage, and that, if he could not pay it before it should "become due again," he would give her a deed of the place, and save her the expense of foreclosure. On April 9, 1898, he executed and delivered to her a quitclaim deed containing the same description as that contained in the deed from Davis to him. She thereupon brought an action upon the covenant contained in the deed from Davis, upon the claim that it covered the N. W. $\frac{1}{4}$ of the section, and that he had no title to that parcel. The bill in this cause seeks to restrain the prosecution of the action at law, and to correct the deed from Davis to Seeley. A decree was granted in substantial compliance with the prayer, and the defendant Mrs. Benedict has appealed.

We are satisfied that neither Davis nor Seeley understood that the N. W. $\frac{1}{4}$ of the section was included in the deed. The description contained therein is susceptible of either meaning contended for by the respective parties, but there cannot be a doubt that both understood that the two 40's only were the subject of the bargain; and this is

evidenced by the acts of the parties afterwards,—Seeley being satisfied with the possession of those parcels during the time he owned them, and making no other claim. It is suggested by counsel, rather than proved, that Mrs. Benedict was the victim of a shrewd scheme; but, however that may be, we cannot say that she should be allowed to recover on a covenant that neither party understood to cover more than 80 acres. Her mortgage contains a description which indicates, and should have given her to understand, that the mortgage did not cover 200 acres, for it mentions 80 acres. While a statement of acreage does not prevail against a definite description, it may be a valuable aid to explain an otherwise ambiguous description. She took the quitclaim with full knowledge of the intention of the parties, and subject to the equities of Davis.

The decree of the circuit court is sufficiently favorable to the defendant, and will be affirmed, with costs.

The other Justices concurred.

SHAYLER v. GIDDINS.

BILLS AND NOTES—EXTENSION—CONSIDERATION—RELEASE OF SURETY.

A promise to pay interest on an interest-bearing note after maturity until the note is paid is not a sufficient consideration to support an agreement by the payee to extend indefinitely the time of payment, so as to discharge a surety thereon.

Error to Oakland; Smith, J. Submitted January 12, 1900. Decided January 23, 1900.

Assumpsit by Harriet A. Shayler against Eddison Giddins and Andrew A. Garner on a promissory note. From

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a judgment for plaintiff, defendant Garner brings error. Affirmed.

Davis & Bromley, for appellant.

John H. Patterson and *Samuel J. Patterson*, for appellee, cited, in addition to the cases discussed in *Olmstead v. Latimer*, 158 N. Y. 313, referred to in the opinion, the following cases: *Place v. McIlvain*, 38 N. Y. 96 (97 Am. Dec. 777); *Dyar v. Shenkberg*, 93 Iowa, 154; *Eaton v. Whitmore*, 3 Kan. App. 760; *Binnian v. Jennings*, 14 Wash. 677; *Burrus v. Davis*, 67 Mo. App. 210; *Harburg v. Kumpf*, 151 Mo. 16; *Hunt v. Bridg-ham*, 2 Pick. 581 (13 Am. Dec. 458); *Bank v. Parsons*, 138 Mass. 53; *Oberndorff v. Bank*, 31 Md. 126 (1 Am. Rep. 31); *Bank v. McAllister's Estate*, 56 Neb. 188; *Abel v. Alexander*, 45 Ind. 523 (15 Am. Rep. 270); *Olson v. Chism*, 21 Ind. App. 40; *Garton v. Bank*, 34 Mich. 279; *Smith v. Shelden*, 35 Mich. 42 (24 Am. Rep. 529); *Hayes v. Knox*, 41 Mich. 529; *Insurance Co. v. Soule*, 51 Mich. 312; *Case v. O'Brien*, 66 Mich. 289.

HOOVER, J. Shayler took a note signed by Giddins and Garner, the latter being known to be a surety. It was payable in one year, with interest. Garner defends an action upon the note upon the ground that he was discharged by an extension of time given to Giddins without his knowledge. It is admitted that the only consideration for the extension was Giddins' alleged promise to pay interest after maturity, and until the note should be paid. The defendant claims that the note was extended by agreement for a year on three different occasions, when interest due was paid. The plaintiff denies an agreement to extend for a definite period, but admits that she agreed that the note might run, on payment of interest due, if Giddins was not ready to pay the principal. The jury found specially that the plaintiff simply allowed the note to run indefinitely so long as the interest was paid, and that she at no time agreed to extend the time of payment

for a year, or any other definite time. We must therefore consider this question settled, as the evidence was conflicting.

The appellant insists that the promise to pay interest after maturity for an indefinite time was a sufficient consideration for a promise to forbear suit, *i. e.*, extend the time. We think this cannot be, for the reason that the maker was already bound to pay interest until he should pay the note. We are cited to three cases which are said to support this contention; but most, if not all, of them were cases where a time either definite, or susceptible of being made so, was fixed for payment. *Benson v. Phipps*, 87 Tex. 578 (47 Am. St. Rep. 128); *Aiken v. Posey*, 13 Tex. Civ. App. 607; *Kearby v. Hopkins*, 14 Tex. Civ. App. 166. The first seems to turn on an agreement to forbear suit for a definite time, and cites several cases in support of its conclusion that such a promise is a sufficient consideration for a promise by the debtor to pay interest for a longer period than required by the note. The opinion distinguishes cases where there is a mere promise to forbear suit, without any corresponding promise not to pay during the period of the promised forbearance; adding, "In such cases it is clear that there is no consideration for the promise." The others are consistent with this statement. In this connection, see the recent case of *Potter v. Railway Co.*, *ante*, 179. The cases are uniform in opposition to defendant's contention. See *Olmstead v. Latimer*, 158 N. Y. 313 (43 L. R. A. 685), which discusses the New York cases, and plaintiff's brief, which cites numerous Michigan and other cases in point.

The evidence is all before us, and as we are able to say that the court might properly have directed a verdict for the plaintiff, and that no error in the reception or exclusion of testimony appears, we may properly affirm the judgment. It is so ordered.

The other Justices concurred.

PIPER v. PIPER.

INJUNCTION—ABUSE OF PROCESS.

A complainant who, four days before he was entitled to the possession of land, obtained an injunction restraining a tenant from cutting certain immature crops, which the latter had a clear right to harvest at any time within the four days, is not in position to assert in equity his right to the crops after the four days have expired.

Appeal from Kalamazoo; Buck, J. Submitted January 12, 1900. Decided January 23, 1900.

Bill by Hilton E. Piper against Henry W. Piper to restrain the cutting and removal of certain crops. From a decree for complainant, defendant appeals. Reversed.

Dorr O. French (*Samuel W. Oxenford*, of counsel), for complainant.

Osborn, Mills & Master, for defendant.

HOOVER, J. George Piper died testate on May 30, 1891, and his will was duly probated. His widow and son Henry W. Piper were given letters testamentary. The third clause of the will was as follows:

“And it is my will that my son Hilton E. shall not come into possession and control of the said land until he shall have attained the full age of thirty years, and, in case of his death before arriving at said age of thirty years, then said land shall descend to his said children, if any, and, if he should have no children, then the said land shall go to my son Henry W. Piper.”

On August 3, 1892, all of the heirs executed a lease to the widow of all the land belonging to the estate for the term of her natural life, with the following limitation:

“Except the last-described piece or parcel of land,

which said party of the second part hereby expressly agrees to yield up and deliver to said Hilton E. Piper upon his arrival at the age of thirty years."

She took possession, and subsequently Henry W. Piper worked the place under an arrangement with her, and put in the crop of wheat in dispute, for his own benefit, in the fall of 1897. Hilton E. Piper was born on June 27, 1868. On June 23, 1898, he filed the bill of complaint herein, and obtained a preliminary injunction restraining the defendant, Henry W. Piper, from cutting and removing the crops then growing upon the premises. The bill prayed an injunction, and contained the usual prayer for general relief. On June 29th a stipulation was filed permitting the defendant to harvest the wheat upon filing a bond to turn over the wheat, or pay the market price thereof, at the election of the complainant, if the cause should ultimately be decided in favor of the complainant. Upon a hearing, the testimony being taken in open court, it was decreed that the complainant was entitled to relief as prayed in the bill, and it was further adjudged that the defendant perform the condition of his bond by paying the value thereof within 30 days, and that it be referred to a commissioner to determine and report the value. The defendant has appealed.

It appears to be conceded by counsel for the complainant that the widow acquired a valid estate under the lease made by the heirs, which gave her the right to hold the land until June 27, 1898, the date when complainant would become 30 years old, unless such estate should be sooner terminated under the will by reason of his death. They claim, however, that upon that date the right to the possession, and all crops then growing thereon, would belong to the complainant. On the other hand, the defendant's counsel say that the estate was one of necessarily uncertain duration, and that the widow and her tenant were, therefore, entitled to emblements. We find it unnecessary to pass upon the question of the right to emblements. If it be admitted that the complainant would be-

come entitled to the land and all growing thereon upon the 27th of June, it is equally true that the defendant was entitled to the possession and full use of the premises up to that time. As he was under no obligation to plant that his successor might reap, he was not required to refrain from cutting for the successor's benefit. If not entitled to ripen his crop, he was at least entitled to it in its immature condition, for such uses as he might choose to make of it. While the bill does not, in terms, so state, it must have been filed upon the theory that the complainant had a right to have the crop left to ripen for his benefit, if it would not ripen before the 27th. It is difficult to conceive of any other excuse for granting a preliminary injunction. Yet we fail to find that claim made in the brief. The complainant has made use of the process of the court to prevent the cutting of the wheat during the few remaining days left to the defendant to cut it, although the defendant's right to cut it is plain. Whether this was an intentional abuse of process or not, the effect is the same. A court of equity will not countenance a claim based on so inequitable a procedure.

The decree is reversed, and bill dismissed, with costs of both courts.

The other Justices concurred.

COLLINS v. GORDON.

ASSIGNMENT OF MORTGAGE—AGREEMENT TO PAY INTEREST—RECOVERY.

Where plaintiff assigned a mortgage to defendant on his agreement to pay plaintiff accumulated interest out of the first interest that should be paid on the debt, and defendant was compelled to foreclose the mortgage for nonpayment of interest, and realized less than the principal sum due, plaintiff was not entitled to recover such back interest.

Error to Livingston; Smith, J. Submitted October 6, 1899. Decided February 20, 1900.

Assumpsit by Addison C. Collins against Thomas Gordon, Jr., upon an agreement to pay the accumulated interest on a mortgage. From a judgment for plaintiff on verdict directed by the court, defendant brings error. Reversed.

Fred H. Warren and *William P. Van Winkle*, for appellant.

Louis E. Howlett, for appellee.

MONTGOMERY, C. J. This is an action of *assumpsit*, brought to recover \$241 and interest, claimed to be due upon the following paper writing:

“\$241.00.

“For value received, I promise to pay to Addison C. Collins the sum of two hundred forty-one dollars, being the accumulated interest on a certain note secured by mortgage, given by Peter Pergau and Julia Pergau to Addison C. Collins and Jane Collins, his wife, for the sum of five thousand dollars principal, bearing date March 29, 1895, out of the first moneys paid on said note as interest, and out of the first moneys by me collected on said note as interest, as soon as the same is paid, collected, and received; which said note secured by mortgage was duly

sold and assigned to me by Addison C. Collins and Jane Collins, his wife, by assignment dated December 3, 1895.

"Dated December 7, 1895.

"[Sgd.] THOMAS GORDON, Jr."

On the 3d of December, 1895, the plaintiff and his wife sold and assigned to the defendant a note and mortgage for \$5,000, given March 29, 1895, by Peter Pergau and wife to said plaintiff and wife, on 200 acres of land in Washtenaw county, Mich. The amount paid by the defendant for the note and mortgage was \$4,500, and, in addition, he agreed to pay the further sum of \$241 "out of the first moneys paid on said note as interest, and out of the first moneys by me collected on said note as interest." No payments of either principal or interest were ever made on said note and mortgage. May 6, 1896, a bill of complaint was filed by defendant in the Washtenaw circuit court, in chancery, to foreclose said mortgage, wherein it was charged that the premises were a scanty security for the indebtedness represented by the mortgage, that they were so situated that they could not be sold in parcels, and praying that the money realized from a sale of the entire property might be applied towards the payment of the whole amount secured by said mortgage. December 22, 1896, a decree was made ordering a sale of the entire property, and that out of the proceeds the complainant should be paid "the whole amount secured to be paid by the said note and mortgage." August 16, 1897, the property was sold under said decree to the complainant, Gordon (defendant here), who bid \$5,000, and received a deed therefor; the commissioner certifying that he paid said amount, less costs, to the complainant by deed. It further appeared that the plaintiff knew the property was advertised to be sold on foreclosure sale, but made no effort to find out when the sale was to take place. Upon the foregoing state of facts the circuit judge directed a verdict for the plaintiff for \$265.10 (being \$241 and interest from date of foreclosure sale), and judgment was entered accordingly. When the bill was filed, only in-

terest was due. The decree was for the sale of all the premises to satisfy the amount due and to grow due on the mortgage. The sale was for \$5,000.

Plaintiff contends, first, that, as the interest only was due, the defendant received the amount of the note in suit on the interest, or, at least, that the plaintiff is entitled to prorate. Defendant contends that the contract was to pay out of money realized, and that he has not received the money, and, further, that, if the purchase of lands be treated as a payment of money, what he received was the principal, and not the interest; that the true intent was that, if the defendant received the principal, and the interest in addition, he was to be liable, but not if he received the amount of the principal only. We think the latter the true construction of the agreement. The transaction indicated that the parties intended that, as a condition to the payment of the undertaking in suit, the maker of the mortgage should make payment of the interest money to grow due, leaving the defendant's security for the principal sum of \$5,000 intact. This never occurred. The defendant was compelled to foreclose his security, and has realized much less than the principal sum due. The case is somewhat like *Reed v. Northrup*, 50 Mich. 442.

The judgment will be reversed, and no new trial ordered.

The other Justices concurred.

PEOPLE v. CARTER.

1. CRIMINAL LAW — EMBEZZLEMENT — ABSCONDING DEFENDANT — PROOF OF DEMAND.

Omission to prove a demand for money alleged to have been embezzled is not fatal where the accused absconded after receiving the money, and admitted that the money had been lost on the races.

2. SAME.

Upon a prosecution for embezzlement, proof that respondent receipted for certain moneys as treasurer of an association, and that the moneys were intended by the depositor to be applied to the purchase of stock therein, sufficiently shows that the moneys belonged to the association.

3. SAME—CORPORATION DE FACTO.

Where an attempt was made by an association to organize a corporation under a state law, and articles of association were prepared, and the incorporators assumed to do business as a corporation, the association became a corporation *de facto*, within 8 Comp. Laws 1897, § 11591, punishing embezzlement from an "incorporated company."

4. SAME.

Upon a prosecution for embezzlement from a corporation, it is sufficient to show that the property embezzled was the property of a corporation *de facto*.

Error to recorder's court of Detroit; Chapin, J. Submitted October 26, 1899. Decided February 20, 1900.

Samuel G. Carter was convicted of embezzlement, and sentenced to imprisonment for one year in the Detroit house of correction. Affirmed.

Walters, Humphrey & Walters, for appellant.

Allan H. Frazer, Prosecuting Attorney, and *William H. Turner*, Assistant Prosecuting Attorney, for the people.

MONTGOMERY, C. J. On the 19th of May, A. D. 1899, defendant was tried and convicted in the recorder's court of the city of Detroit on an information charging him with embezzling \$100 in money belonging to the Detroit Temple of Labor Association, a corporation organized under Act No. 13 of the Public Acts of 1897, entitled "An act to provide for the incorporation of labor associations," which said money had come into his hands as agent of the said association. At the trial it was shown that he was agent and officer of said corporation, and on the 14th day of June, A. D. 1898, was its treasurer, and received the said sum of \$100 from the Detroit Typographical Union No. 18, giving his receipt therefor, dated said June 14, A. D. 1898, in return for which he was expected to issue 100 shares of stock of said association. Defendant admitted at the trial that he received this amount of \$100, and, in addition, other amounts, as such agent and officer of said association, aggregating between \$800 and \$1,100; that he had spent all of this money betting on horse races in Detroit, Windsor, Mt. Clemens, and Chicago. Defendant claims:

(a) That no demand was made upon him for the money alleged to have been embezzled.

(b) That the \$100 alleged in the information to have been embezzled was not the property of the Detroit Temple of Labor Association.

(c) That the money charged to have been embezzled was not received by him in the course of his duties, and that he was not authorized to receive it.

(d) That the articles of association of the Detroit Temple of Labor Association were not filed as required by law.

(e) That the Detroit Temple of Labor Association is not a corporation.

(f) That the persons who signed the articles of association, of whom defendant was one, were partners, and that defendant's act was, therefore, not embezzlement.

(g) That the Detroit Temple of Labor Association is not such an "incorporated company" as is meant by that term as used in the embezzlement statute (3 Comp. Laws 1897, § 11591).

(h) That Act No. 13, Pub. Acts 1897, is unconstitutional and void.

It appears that the defendant absconded after receiving the money into his possession, and there was evidence that he subsequently admitted that the money of the association was gone, and that he lost it on the horse races. Under these circumstances, the omission to prove demand is not fatal. See *Kossakowski v. People*, 177 Ill. 563.

We think there can be no doubt that the money charged to have been embezzled was the property of the Detroit Temple of Labor Association. The defendant receipted for the money as treasurer, and it was intended by the depositor to be applied to the purchase of stock in the association. There is no doubt, either, from the record, that the money was received by the defendant in the course of his duties.

The remaining questions raised may be treated briefly. All these objections are answered if embezzlement can be committed as to a corporation *de facto*. It appears conclusively that an attempt was made to organize a corporation under Act No. 13 of the Public Acts of 1897, that articles of association were prepared, and that the incorporators assumed to do business as a corporation. The association, therefore, became a corporation *de facto*. The rule is well established that, in a criminal prosecution for embezzlement, it is sufficient to show that the property embezzled was the property of a corporation *de facto*. 8 Am. & Eng. Enc. Law (2d Ed.), 757, note; *People v. Hawkins*, 106 Mich. 479; *Smith v. State*, 28 Ind. 321; *Kossakowski v. People*, *supra*; *People v. Oldham*, 111 Cal. 648.

The conviction is affirmed.

The other Justices concurred.

STEVENS v. BEARDSLEY.

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1. LANDLORD AND TENANT—ACTION FOR RENT—EVIDENCE.

In an action for rent, where the amount was in dispute, it was error to admit evidence as to what the tenant of adjoining premises, also owned by plaintiff, paid him for their rental.

2. SAME—VALUE—CREDIBILITY OF WITNESSES.

It was proper, however, where defendant alleged, and plaintiff denied, an agreement that he should occupy at a reduced rental, to show, as bearing upon the probabilities of the truthfulness of the parties, that rents in the locality had depreciated during the period of defendant's occupancy.

3. EVIDENCE—ADMISSIBILITY.

It is reversible error for the trial court to allow the introduction of testimony as to matters outside the issue, calculated to prejudice the jury against one of the parties. So *held*, where certain irrelevant verses, written by plaintiff upon the reverse of a letter to defendant's attorney, were permitted to be read in evidence.

Error to Montcalm; Davis, J. Submitted November 14, 1899. Decided February 20, 1900.

Assumpsit by William H. Stevens against William R. Beardsley for rent. From a judgment for defendant, plaintiff brings error. Reversed.

V. H. & H. H. Smith, for appellant.

L. C. Palmer, for appellee.

LONG, J. Plaintiff sued defendant for rent of a store building in the city of Stanton, the claim being for rent from October 8, 1887, to December 31, 1892, five years and three months, at \$8 per month, amounting to \$504. The defendant claimed as a set-off the payment of \$304 in merchandise and cash, and also the payment of \$24 rent to March 19, 1888. He also claims that the contract

for the rent of the store was for \$8 per month from October, 1887, to March 19, 1888, and that at the latter date a new agreement was made at the rate of \$6 per month; that he occupied it at the new rate until March 19, 1889, when the rent was again lowered to \$5, at which rate he occupied it until January 2, 1893. The use and occupation of the premises for the full period claimed is admitted by the defendant. The plaintiff admits receiving payments amounting to \$230.95, but denies the balance of defendant's set-off, \$73.05. He also denies payment in full to March 19, 1888, and claims there is due, including interest, \$368.10. The jury found in favor of the defendant, allowing him all his set-off, giving him a verdict for \$5.34, upon which judgment was entered for that amount. Every item of defendant's set-off was necessary to give the balance in his favor. The following items, with others, were especially disputed by plaintiff: \$35 claimed to have been paid by defendant by his giving plaintiff an order for that amount on a third person; \$9.80 claimed to have been expended by Beardsley in building a partition in the store, which he claimed plaintiff was to furnish; and \$24 claimed to have been paid in February, 1888. Plaintiff brings error.

It appears that the block, a part of which defendant occupied, was divided into three stores, the defendant occupying the half of the middle one. The plaintiff testified that he did not know what year the corner one was occupied after defendant went in. He was then asked on cross-examination, "Do you know how much he [the occupant of the corner store] paid you per month?" This was objected to by plaintiff's counsel, the objection overruled, and plaintiff was directed to answer, and did answer, "Eight dollars per month." The first assignment of error is based upon this ruling. We think this was error. This evidence could have no bearing whatever on the question of the amount of rent to be paid by defendant for the other store. It is sometimes permissible to show the value of the article in dispute as bearing upon

the probability of the truthfulness of the parties, but under no rule can the price or value of other articles, or the rental value of other property, be shown as bearing upon the probability of the truthfulness of the parties.

The court admitted testimony tending to show that the rent of other business houses in the city of Stanton depreciated during the time of defendant's occupancy, as relating to the tendency of the prices for rents, whether upward or downward, or whether rents remained stationary. This is assigned as error. We think the court was not in error in this. It has frequently been held that, where the contract price is in dispute, testimony as to value may be shown as bearing upon the probabilities of the truthfulness of the parties. *Misner v. Darling*, 44 Mich. 440; *Wickes Bros. v. Swift Electric Light Co.*, 70 Mich. 322.

The principal error claimed, however, relates to the ruling of the court in admitting in evidence a certain letter written by plaintiff to the defendant's attorney, upon the reverse side of which was written by the plaintiff certain verses, which reflected severely upon the integrity of the defendant. The court permitted these verses, as well as the letter, to be read in evidence. We think the court was in error in receiving the letter and verses in evidence. The letter itself contained no admissions that the defendant was not liable for rent, and in fact it expressly charged that "Rance [the defendant meaning] won't pay his rent." The verses might well tend to prejudice the plaintiff's case before the jury. It was held in *Bennett v. Eddy*, 120 Mich. 300, that it was error for the trial court to allow the introduction of testimony as to matters outside the issue, and which would tend to prejudice the jury against one of the parties.

Some other errors are claimed, but those questions are not apt to arise on another trial, and we therefore do not deem it necessary to pass upon them. For the errors pointed out, the judgment must be reversed, and a new trial granted.

The other Justices concurred.

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CITY OF MT. CLEMENS v. SHERBERT.

MUNICIPAL CORPORATIONS — PEDDLERS—LICENSE FEE — VALIDITY OF ORDINANCE.

Under 1 Comp. Laws 1897, § 8107, subd. 11, authorizing cities of the fourth class to regulate by ordinance the licensing of peddlers, but conferring no discretion upon the city officers in the matter of fixing license fees, an ordinance which purports to prohibit the sale from house to house of a certain commodity without a license, but fails to fix the license fee, is invalid.

Exceptions before judgment from Macomb; Eldredge, J. Submitted November 15, 1899. Decided February 20, 1900.

William Sherbert was convicted of peddling without a license. Reversed.

W. W. Wicker (Humphrey & Grant, of counsel), for appellant.

O. C. Lungerhausen, City Attorney, for appellee.

HOOKEE, J. The defendant was convicted of the offense of peddling tea, in contravention of an ordinance of the city of Mt. Clemens which provides:

“No person shall in any way peddle in the city of Mt. Clemens without having first obtained a license therefor from the mayor or common council of said city; and the selling of any commodity from a wagon, hand-cart, or other receptacle, upon the streets of said city, and as well selling from house to house, whether for present or future delivery, shall be deemed peddling, within the meaning of this ordinance.”

“SEC. 3. The provisions of this ordinance shall not apply to the sale of any article or commodity used for feed or food when sold by the original grower or producer thereof, or fish when sold by those who caught them, nor

to Indian baskets and beadwork when sold by makers thereof, nor to the sale of books."

It is contended that the defendant was improperly convicted, for the reason that no license fee is fixed by the ordinance for selling tea. The ordinance enumerates a long list of articles, and then provides (section 6) that:

"At any time license is desired to sell any article or commodity which is not herein especially provided for, the petition for that purpose shall be submitted to the common council, and their action upon such petition taken."

The city is authorized to pass ordinances—

"To license hawkers, peddlers, and pawnbrokers, and hawking and peddling, and to regulate, license, or prohibit the sale or peddling of goods, wares, merchandise, refreshments, or any kind of property or thing by persons going about from place to place in the city for that purpose." 1 Comp. Laws 1897, § 3107, subd. 11.

Until an ordinance is passed providing for such license, there is nothing to prohibit the sale of tea from house to house, which is a lawful occupation. The ordinance in question prohibits the sale from house to house of all commodities without a license, but it does not fix the license fee that shall be paid for the privilege of selling tea. While it fixes a schedule of fees for many articles, tea is nowhere included, and one who wishes to engage in the sale of tea must make an application, and await the action of the common council. The ordinance should definitely fix the fee, that one engaging in that business may know what it is, and have some assurance of uniformity of charge to those engaging in such business. See *Bull v. City of Quincy*, 9 Ill. App. 131; *Besse v. Village of Crotty*, 93 Ill. 180. This charter does not purport to give discretion to the city officers in fixing a license. It authorizes the regulation of the subject by ordinance. In discussing a similar question, the supreme court of Indiana said, in the case of *Bills v. City of Goshen*, 117 Ind. 226 (3 L. R. A. 264):

“Horr & Bemis’ work on Municipal Police Ordinances (section 13) says: ‘The extent to which discretion may be given to the ministerial officers in the granting of licenses is in dispute. Express power in the charter will warrant such delegation. The authorities differ widely, but the proper conclusion seems to be that as little latitude should be given to the ministerial officer as possible. In exercising a power to license certain occupations, the council should, by its ordinance, prescribe the exact occupation to be licensed; the amount of the fee to be charged, either uniformly or by reasonable classification; the conditions upon which the license may be issued, and the duration of its validity,’ etc. Section 263, same authority, says: ‘As has been already stated, no discretionary powers should be vested in the officers whose duty it is to execute the provisions of ordinances, and the rule is entirely applicable to this class of ordinances. The ordinance itself should specify every condition of the license, and the officer should be merely intrusted with the duty of issuing licenses to all who comply with the prescribed conditions.’ This is undoubtedly the true theory and the correct law governing ordinances for license. The statute provides that the common council may, by ordinance, license, and may prohibit certain pursuits without first being licensed; and it further provides that ordinances prescribing penalties for the violation of the same shall be published. It is, further, a well-settled principle that cities cannot discriminate between citizens engaged in the same business; that, if they license, they must license all alike. See *Graffy v. City of Rushville*, 107 Ind. 502 (57 Am. Rep. 128); *Benjamin v. Webster*, 100 Ind. 15. It is therefore material to the validity of an ordinance that a fixed and definite license fee should be named therein, which all persons engaged in like business shall pay. Section 2 of the ordinance in question in this case is defective in that it does not fix any amount to be paid as a license fee, but leaves it open for the common council to fix the fee to be charged in each particular case. Besides, it seeks to delegate the power to fix the fee to be charged in each case to the mayor of the city, which there was no right to do. It is also defective in that it does not state the time of the duration and validity of the license to be issued. As we have stated, this ordinance provides a penalty for the violation of the ordinance, and the violation consists in the doing of the things specified without first having procured a license. The statute requires such

ordinances to be published, and the material matters omitted from that ordinance are such as ought to be published, to advise the citizens what they are required to do to comply with the city law. By the reading of this ordinance it could not be determined what license fee must be paid, nor the duration of the validity of the license. It follows as a conclusion that, if the defects could be supplied by the passage of another ordinance by the council (which must be conceded to be exceedingly doubtful), such supplemental ordinance must be published before it could be effective."

It is unnecessary to discuss the other questions raised. The conviction is set aside, and no new trial ordered.

The other Justices concurred.

RICE v. DETROIT, YPSILANTI & ANN ARBOR RAILWAY.

1. STREET RAILWAYS—FRANCHISES—SALES OF TICKETS.

A franchise to a street-railway company by a village, providing for the sale of tickets on cars of the company, good either way between the village and a specified city, in strips of five at a reduced rate, requires such tickets to be kept for sale on cars at any point on the line, and not solely at points within the limits of the village.

2. SAME.

Where a street-railway company neglected to furnish its conductors with through tickets, good between a village and a city, for sale at a reduced rate, as required by its franchise, but provided, in lieu thereof, coupon tickets in two parts, one good between the village and an intermediate point and the other between that point and the city, it could not defend an action brought by a through passenger who was compelled to pay an increased fare because of his inability to obtain from the conductor at the intermediate point one of the coupon tickets aforesaid, upon the ground that the ticket demanded, and which it was accustomed to sell, was not the kind required by the franchise.

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122	677
s81NW	927
e188	1541

Error to Wayne; Frazer, J. Submitted November 15, 1899. Decided February 20, 1900.

Assumpsit by Alfred Rice against the Detroit, Ypsilanti & Ann Arbor Railway to recover excess fare paid under protest. From a judgment for plaintiff on verdict directed by the court, defendant brings error. Affirmed.

J. Emmet Sullivan, for appellant.

Smith & Curtis, for appellee.

MONTGOMERY, C. J. The defendant and appellant in this cause is a street railway that maintains and operates a railway between the cities of Detroit and Ann Arbor, in the township of Springwells, in the village and township of Dearborn, and other places. The cars of the defendant go over the track of the Detroit Citizens' Street-Railway Company to the city hall, in the city of Detroit. Defendant has been selling five tickets for 50 cents, each good for a trip between the city hall, in the city of Detroit, and the village of Dearborn. Each of the five tickets is divided into two parts,—one good from the village of Dearborn to the Flint & Pere Marquette Railroad crossing, and the other good between the Flint & Pere Marquette Railroad crossing and the city hall, in the city of Detroit. The franchise granted to defendant by the village of Dearborn provided as follows:

“It is further provided that the said grantee shall charge not to exceed the following rates, to wit: From any point in said village of Dearborn to Woodward avenue, in the city of Detroit, or any point west of Woodward avenue, in the city of Detroit, fifteen (15) cents cash fare, good either way, or two tickets for twenty-five (25) cents, good either way; a strip of five (5) tickets shall be sold for fifty (50) cents.”

By the terms of the Dearborn franchise, the defendant may charge 5 cents for a ride in said township; and the Springwells franchise permits a charge of 5 cents from the Flint & Pere Marquette Railroad crossing to Dearborn township.

The plaintiff, on the 21st day of July, 1898, in the city of Detroit, boarded a car bound for the village of Dearborn. He gave the conductor a portion of a through ticket, which entitled him to ride to the Flint & Pere Marquette Railroad crossing, in the township of Springwells. Upon arriving at the crossing, the conductor came to take up fare for the trip between the Flint & Pere Marquette Railroad crossing and the village of Dearborn. Plaintiff tendered 50 cents, and demanded a sale to him of a strip of five tickets good between the city hall, or Woodward avenue, in the city of Detroit, and the village of Dearborn,—not specially for the purpose of paying his fare to Dearborn with a portion of the strip, but for the purpose of being carried to and fro between the city hall, in the city of Detroit, and the village of Dearborn. The conductor, not having any of these strips of tickets, demanded that the plaintiff pay 10 cents for the trip between the Flint & Pere Marquette Railroad crossing and the village of Dearborn, which plaintiff paid under protest. He thereafter brought suit against defendant for 5 cents. A judgment in the circuit court, on appeal from the justice, was rendered for the plaintiff for 5 cents and costs, by direction of the court.

The pleadings are not printed in the record, so that we must assume that no point was intended to be made as to the sufficiency of the declaration. We have, then, a case in which defendant is operating under a franchise imposing a duty to sell five tickets for 50 cents, good between the city hall, Detroit, and any point in the village of Dearborn. The franchise further provided, "All such tickets shall be kept for sale upon each and every car operated by it." It is contended that the franchise is in force only within the territorial limits of the village, and does not cover territory in other townships. We do not think this contention can be sustained. The franchise is in the nature of a contract, and imposes obligations upon the company which those having occasion to ride from Dearborn to Detroit have a right to enforce. It is

urged that the case of *Kissane v. Detroit, Ypsilanti & Ann Arbor Railway*, 121 Mich. 175, is authority for defendant's contention. No such doctrine is announced in that case. It was held, it is true, that the plaintiff was not compelled to rely on the restrictions contained in the franchise granted by the municipality in which he boarded the car, but that he might, under such franchise, pay his fare to a point in another municipality, and there avail himself of the terms of a franchise granted by the latter. The plaintiff's right under this franchise is not different than it would have been had the franchise in Springwells been silent on the subject of fares. The defendant saw fit to contract with the village of Dearborn for a rate outside the limits of the village, and to agree that tickets should be sold on its cars. This contract it cannot repudiate.

But it is urged that no damage was shown, for the reason that the tickets which the defendant was accustomed to sell (consisting, as they did, of two parts) were not the kind of tickets required by the franchise, and that the company was not required to accept the strip from the Flint & Pere Marquette crossing to Dearborn, but was only required to furnish a through ticket. It might be a sufficient answer to say that a failure to sell the tickets to plaintiff when demanded entitled him to nominal damages, at least, and that no more than nominal damages were recovered; but a further answer is that defendant has placed its own construction on the requirements, and has provided tickets in form to suit itself. The plaintiff was entitled, by means of such tickets, to a ride from the city hall to Dearborn for 10 cents. He sought to obtain it by means of the only ticket kept by the defendant for sale. One part of such a ticket had been given up, and, if he had been able to obtain the tickets requested, the remaining portion of the ride could have been paid for with the other coupon.

The judgment is affirmed.

The other Justices concurred.

CLINK *v.* CARPENTER.¹

ACCOUNTING—PREMATURE SUIT.

Defendant furnished money to purchase lands sold for taxes, and complainant was to attend to the legal business connected therewith, manage the enterprise, and receive one-half of the profits on sales, after deducting the purchase price and expenses. Lands not sold were to belong to the parties equally. Complainant testified that it was understood that the properties might remain in defendant's name one year, if not sold. *Held*, in a suit for an accounting brought before the expiration of the year, that complainant was not entitled to a one-half interest in the lands except on payment of one-half of the purchase price.

Appeal from Muskegon; Russell, J. Submitted November 16, 1899. Decided February 20, 1900.

Bill by Stephen H. Clink against George W. Carpenter for an accounting. From a decree for complainant, defendant appeals. Reversed.

Complainant, an attorney-at-law, and defendant, a farmer, entered into the following agreement:

"It is hereby agreed by and between George W. Carpenter, of Coopersville, and Stephen H. Clink, of Muskegon, that they shall operate jointly in the purchase of tax titles, and in disposing of the property purchased.

"It is agreed that the said Carpenter has furnished the money to purchase twenty-one descriptions in the city and county of Muskegon.

"The said Clink shall put in his time and legal skill in the management of this enterprise, and all law business of every nature pertaining to the same. Then, as each piece is disposed of, the said Carpenter shall take out for himself whatever sum of money he has expended in the purchase of said piece, and the expenses, and the balance

¹ Rehearing denied May 18, 1900.

shall be divided equally between said Clink and said Carpenter; and any piece that cannot be sold or disposed of satisfactorily to both parties within a reasonable time shall belong equally to said parties. Whatever further purchases are made shall be governed by these same conditions."

While the contract was dated January 5, 1897, it was not executed until February 5th. For these 21 descriptions, defendant paid \$1,800. Other lands were afterwards purchased. Several pieces of the lands had been sold by Mr. Carpenter, and settlement made. Trouble arose between defendant and complainant, whereupon complainant, on May 16, 1898, filed this bill, praying for an accounting, that defendant be compelled to convey to him a one-half interest in the lands unsold, and that the same be partitioned and divided. The case was heard upon pleadings and proofs in open court. There were many disputed items, but the principal questions arose over the construction of the contract, and the effect of a deed of what is known as the "Sullivan Farm" by complainant to defendant; the former claiming that it was a sale for \$1,400, and the other claiming that it was a mortgage to secure a loan of \$126. The court below decided all the contentions in favor of the complainant; held that, by the terms of the contract, complainant was entitled to a one-half interest in the lands, without payment to defendant for the moneys which he had advanced; that defendant was indebted to complainant in the sum of \$688.94; and directed a sale of the premises upon failure of defendant to pay.

Stephen H. Clink (Walter I. Lillie, of counsel), in pro. per.

Henry B. Fallass (A. C. Denison, of counsel), for defendant.

GRANT, J. (*after stating the facts*). 1. The titles to a part of these lands were obtained from the auditor

general the latter part of July, 1897, and the titles to the other portions were not obtained until August and November of the same year. Complainant filed his bill May 16, 1898,—less than 10 months after the first titles were obtained, and about 6 months after the last title was obtained. It is the theory of the complainant, and the court so held, that a year was a reasonable time within which to dispose of these lands, and thus enable Mr. Carpenter to receive back the purchase price. Complainant testified that, before the contract was drawn, it was understood—that he had a conversation with defendant in which it was said—that the property should remain in his (defendant's) name one year, if not sold. Under the decree, complainant receives the benefit of the money paid by defendant in the purchase of the lands remaining unsold, which was about \$2,000. Defendant is also compelled to pay the expenses (or at least one-half of them) paid out by Mr. Clink in the joint venture. It is contended by the defendant that the plain construction of the contract is that, when the lands were sold, he was to receive back the amount advanced, and that complainant was limited to one-half of the net profits. We need not determine which is the correct construction. The decree is contrary to the complainant's own theory and testimony. The year had not expired when he filed the bill. He was not entitled to his one-half interest in the lands, relieved from his obligation to pay half of the purchase price, until after a year from the date of each deed. Complainant chose to dissolve the partnership, and filed his bill for an accounting. He must lie in the bed he has made. At that time he was not entitled to his one-half interest. He has thereby waived the question of time, and is only entitled to his interest upon paying one-half of the purchase price and expenses paid by defendant.

2. Clink was once the owner of what is known as the "Sullivan Farm;" mortgaged it to one Torrent, who foreclosed and bid it in; neglected to pay the taxes; deeded it to his wife; purchased the tax title; and, about the time

that the contract which is the subject of this controversy was made, gave a warranty deed to the defendant. The only title he then had was the tax title. The courts subsequently held that tax title void. Complainant contends that this conveyance was an absolute sale for the sum of \$1,400, \$100 of which he testified was paid at the time, and that the balance was made up of various items which defendant contends were to be used, and some of which were used, in the purchase of these titles. Complainant made defendant his own witness, who testified that the deed was given him to secure a loan of \$126. Complainant afterwards took the stand and contradicted him, testifying that it was a sale. Complainant therefore stands in the position of contradicting his own witness in matters as to which it was entirely unnecessary to call him. Whether he is bound by his testimony under such circumstances, we need not determine. We have no hesitation in holding that the clear weight of the evidence upon the point is with the defendant, Carpenter. It follows that the court was wrong in holding that this conveyance was a deed, and not a mortgage. It also follows that the moneys which the complainant received from defendant, and which he sought to apply upon the payment of the purchase price of this land, must be charged up to complainant in the accounting.

There are other small items of difference, unimportant here to determine. In so far as they are not covered by the above rulings, they can be disposed of upon the settlement of the decree.

Decree reversed, and entered here in accordance with this opinion, with costs.

The other Justices concurred.

CORNETT v. CORNETT.

122	685
124	260
122	685
811W	920

INSANE PERSONS — GUARDIANSHIP — PETITION FOR DISCHARGE —
ESTOPPEL.

A proceeding by an adjudged lunatic in probate court, under 3 Comp. Laws 1897, § 8724, which provides that the guardian of any insane person may be discharged when it shall appear, on application of the ward or otherwise, that such guardianship is "no longer" necessary, will estop the ward from subsequently going into equity and attacking the validity of the original appointment.

Appeal from Jackson; Peck, J. Submitted January 3, 1900. Decided February 20, 1900.

Bill by George Cornett to restrain William H. Cornett from assuming to act as complainant's guardian, and to set aside the proceedings under which he claimed authority so to act. From a decree dismissing the bill on demurrer, complainant appeals. Affirmed.

Pringle & Hewett, for complainant.

Blair, Smith & Townsend, for defendant.

MONTGOMERY, C. J. The complainant's bill alleges certain fraudulent proceedings in the year 1896 by the defendant to get possession of his property from a custodian in another county, and the bringing of it to the county of Jackson, for the purpose of giving a seeming jurisdiction to the probate court for proceedings to appoint a guardian, and the following up of that fraud by statements, without any reason or foundation of facts, to show that the complainant was insane; that by such means, while the complainant was entirely sane and competent, and transacting business as a traveling salesman in the State of Indiana, the defendant, without actual notice to him, or

his knowledge, fraudulently procured a decree of the probate court adjudging the complainant incompetent to take care of himself or manage his property, and the appointment of the defendant as guardian of his person and property. The guardian qualified and acted, and in January, 1898, filed with the probate court an account, alleging that he had expended, or become entitled to compensation as guardian to, the sum of \$135.48. At the time of filing the bill, the guardian claimed to have an additional account, which had not then been presented. The complainant's bill is in the nature of a review of such proceedings, and was demurred to for the reason, among others, that it appeared by the bill that, before it was filed, the complainant had applied to the same court by petition, and on such application had been discharged from guardianship. The circuit judge found as follows:

"It appears from the bill that the defendant was appointed special guardian of the complainant by the probate court of Jackson county on or about the 15th day of May, 1896; that he filed a bond as such guardian, which was approved June 15, 1896, and entered upon the discharge of his duties as such guardian; that on the 24th day of August, 1896, the defendant was appointed guardian of the complainant by the said court, filed a new bond, which was approved August 29, 1896, and from that day forward assumed to be and acted as guardian of the complainant. It further appears from the eighth paragraph of said bill, and the probate files, that on the 6th day of January, 1899, complainant filed a petition in the probate court alleging his then present competency to manage his own affairs, and praying that he be discharged from said guardianship; that a hearing was had in said court on that petition, and the testimony of numerous witnesses taken; and that on or about the 9th day of February, 1899, an order was made by said court thereon, relieving the complainant from said guardianship, and ordering the defendant, as such guardian, to turn over the property in his hands to the complainant, and within 10 days thereafter to file his final account as such guardian. In the ninth paragraph of his bill the complainant refers to all the records and files in the probate court in said matter, in order to show more fully the matters alleged in the bill.

Referring to the records and files of the probate court in said matter, which were exhibited at the hearing of this demurrer, it appears that on March 3, 1899, the defendant, in pursuance of said order of the probate court, did file his account as such guardian, but that no hearing has yet been had upon said account in said court, nor has any order for such hearing been made. By the present bill the complainant prays for a decree declaring the appointment of the defendant as his guardian by the probate court, and all proceedings therein, without jurisdiction and void, because of frauds and defects in the proceedings themselves."

The circuit judge sustained the demurrer, and from a decree dismissing complainant's bill the complainant appeals.

The circuit judge was of the opinion that the complainant should be held to have voluntarily submitted to and invoked the jurisdiction of the probate court, with full knowledge of all the facts, and should be held estopped from complaining of the fraud or jurisdictional defects set up in the bill. In this conclusion of the learned circuit judge we concur. The proceeding by complainant in probate court was taken under section 8724, 3 Comp. Laws 1897, which provides:

"The guardian of any minor, spendthrift, insane or other person may be discharged by the judge of probate when it shall appear to him, on application of the ward or otherwise, that such guardianship is *no longer* necessary."

The application under this provision must, of necessity, assume the fact of guardianship. The statute designates only those who are under guardianship as the ones who are entitled to proceed under it. A proceeding under this section is therefore entirely inconsistent with a claim that no guardianship existed. The claim that no cause existed for appointing a guardian in the first instance, or that the court was imposed upon, if established in a proper proceeding, would have fixed the *status* of the complainant for the future, without the necessity of any proceeding under this statute. When such a proceeding is taken, it

must be held that it precludes the ward from going back and attacking the original appointment. To hold otherwise would admit of the ward obtaining relief piecemeal, — part in one court, and part in another.

The decree is affirmed, with costs.

The other Justices concurred.

122	688
184	616

PIPPER v. WAYNE CIRCUIT JUDGES.

TITLE TO OFFICE—CONTESTING CLAIMANT—MANDAMUS.

The title of the incumbent of an office who is *prima facie* entitled thereto, and who is actually exercising its functions, will not be tried in *mandamus* proceedings instituted by a contesting claimant.

Mandamus by Jacob Pipper to compel William L. Carpenter and Robert E. Frazer, circuit judges of Wayne county, to determine, in *mandamus* proceedings instituted by relator against William Blanck, the title to the office of supervisor of the township of Hamtramck. Submitted January 2, 1900. Writ denied February 20, 1900.

Jasper C. Gates, for relator.

Bacon & Yerkes, for respondents.

MOORE, J. On the 11th day of October, 1899, a judgment was entered in the circuit court for the county of Wayne in an action of *quo warranto* brought by Allan H. Frazer, prosecuting attorney, against Bernard Monaghan, who was holding and exercising the office of supervisor of the township of Hamtramck, ousting the said Monaghan therefrom; and by virtue of such judgment the office of supervisor of the township of Hamtramck be-

came vacant. On the 13th day of October, 1899, a meeting of the township board of the township of Hamtramck was held for the purpose of filling the vacancy in the office of supervisor of that township, and the action taken by the board is recorded as follows:

"Township board of township of Hamtramck met at the office of the township clerk on Friday, Oct. 13, A. D. 1899. Present at said meeting: John Reed, chairman; James Colquett, J. P.; and George Gable, clerk. The meeting being called to order, the chairman announced that he wanted a full board to choose a supervisor, and Justice Dickinson was called to act. There being no preliminary business, the board at once proceeded to ballot for supervisor. For twenty-five ballots the vote stood two for Wm. Blanck and two for Jacob Pipper. On the twenty-sixth ballot the vote stood three for Wm. Blanck and one for Jacob Pipper, and Wm. Blanck was declared duly appointed supervisor. He at once qualified, and was given credentials to the board of supervisors.

"Recorded this 17th day of October, 1899.

"GEORGE GABLE, Township Clerk."

On the same day, and after such appointment was made, William Blanck took the oath of office as prescribed by the Constitution of the State, and filed the same with the clerk of said township, and immediately upon taking such oath of office he took possession of the books and papers belonging to such office, and entered upon the performance of its duties, and on the same day received a certificate of appointment from the township clerk, which is as follows:

"HAMTRAMCK, Oct. 13, 1899.

"To the Honorable Board of Supervisors of Wayne County:

"*Gentlemen:* At a meeting of the township board of the township of Hamtramck, held at the office of the township clerk, William Blanck was duly appointed supervisor of the township of Hamtramck to fill the vacancy caused by the removal of Bernard Monaghan.

"GEORGE GABLE, Township Clerk."

On the 14th day of October, 1899, William Blanck pre-

sented such certificate to the board of supervisors of the county of Wayne, which was then in session, and was admitted to a seat on said board as supervisor of said township of Hamtramck, and continued to act as a member of said board during the entire session.

Relator claims to have been appointed supervisor at the same meeting, and on the 20th day of October, 1899, relator filed a petition with the respondent William L. Carpenter, praying for an order to show cause why William Blanck should not be required to deliver over to the relator the books and papers belonging and appertaining to the office of supervisor of the township of Hamtramck. Relator alleged in his petition that at the meeting of the township board held on the 13th day of October, 1899, George Gable, township clerk, and James Colquett, justice of the peace, on the first ballot, voted to appoint relator supervisor of said township, and that John Reed and William Dickinson, a justice of the peace of the township of Hamtramck, voted for William Blanck; that William Dickinson was not a member of such board, and was not entitled to sit thereon, and his vote was invalid, and therefore relator received a majority of the legal votes cast, and was elected on the first ballot. Relator also alleges in his petition that William Blanck pretended that he was appointed supervisor of the township of Hamtramck, and that William Blanck had qualified as such supervisor, and claimed and pretended to be the supervisor of said township. William Blanck filed an answer, in which, among other things, he denied that relator was appointed to the office of supervisor of the township of Hamtramck, and alleged that he (William Blanck) was appointed to that office, and that he had qualified and entered upon the performance of the duties of supervisor of the township of Hamtramck, and held the books and papers by virtue of such appointment; and also alleged that, under the undisputed facts, respondents had no jurisdiction to make the order prayed for. At the hearing before the respondents it was decided that, on the face of

the records, William Blanck was appointed supervisor, and was *prima facie* entitled to the possession of the books and papers, and that respondents had no authority to enter into an inquiry as to the merits of the claims of the relator and William Blanck to such office in these proceedings. An order was made dismissing relator's petition.

A similar question was before us in the case of *Ashwell v. Bullock*, *ante*, 620. At the hearing in that case our attention was not called to the case of *Culver v. Armstrong*, 77 Mich. 194, which is cited here by the counsel for relator. We agree with the views expressed by the circuit judges in relation to that case,—that it appeared from the record therein that Speers and Ricker were duly elected, and that there was no *bona fide* controversy as to who was elected to the respective offices, but, as stated by Justice MORSE, the attempt to keep them out was the result of a conspiracy for personal ends. In this case the record discloses that Mr. Blanck was duly appointed to the office, and is now in the discharge of its duties. It is the claim of the relator that the record is ambiguous, and, in order to show just what was done by the town board, it is proposed to give oral testimony. Relator is not able to make his case without doing so, and it will also be necessary to enter upon the inquiry for whom the respective members of the town board voted. Mr. Blanck is *prima facie* entitled to the office. He is now in the discharge of its duties. The relator claims he was duly appointed, and that he is entitled to the books and papers pertaining to the office. This raises such an issue as ought not to be tried in this proceeding. The case is ruled by *Ashwell v. Bullock*, *supra*, and the cases there cited.

The writ of *mandamus* will be denied.

The other Justices concurred.

TAYLOR v. MONTCALM CIRCUIT JUDGE.

APPEALS FROM JUSTICE'S COURT — PLEA OF TITLE—JURISDICTION.

1 Comp. Laws 1897, §§ 782, 789, which provide that a defendant prevailing in the circuit court in a suit which he caused to be certified from justice's court upon his notice that the title to land was involved shall not recover his costs if the trial judge shall certify that title did not come in question, but shall in such case pay costs to the plaintiff, contemplate that causes so certified shall be tried in the circuit court upon the merits, and it is therefore error for a circuit judge to dismiss such a case for want of jurisdiction upon a finding merely that title is not involved.

Mandamus by Henrietta W. Taylor to compel Frank D. M. Davis, circuit judge of Montcalm county, to vacate an order dismissing an appeal from justice's court. Submitted January 2, 1900. Writ granted February 20, 1900.

Relator brought suit in justice's court in trover for the conversion of certain stone which she alleged the defendant removed from her land. The defendant, with his plea, gave notice that the title to the land would come in question, filed the statutory bond, and the case was thereupon certified to the circuit court. The case was heard before the court without a jury. The court found that the title to the land was not in question, and dismissed the appeal for want of jurisdiction, and ordered that either party might have 20 days to refer the case back to the justice's court for trial. The relator now asks the writ of *mandamus* to compel the circuit court to proceed and try the case.

William O. Webster, for relator.

Frank A. Miller, for respondent.

PER CURIAM. The provisions of the statute applicable

to this case are sections 782, 789, 1 Comp. Laws 1897. They read as follows:

"SEC. 782. In every action where the title to land shall in anywise come in question, the defendant may give notice thereof, under the general issue, upon the return day or any adjourned day of such action, and he may also give notice as in other cases of any other matter of defense."

"SEC. 789. If the judgment in such suit in the circuit or district court shall be for the plaintiff, he shall recover double costs; if it be for the defendant (other than judgment of nonsuit), and the presiding judge of the court before which the issue is tried shall certify that the title to lands did not come in question, the defendant shall not recover costs, but shall pay costs to the plaintiff."

We think the learned circuit judge was clearly in error. When the defendant has removed his case to the circuit court under this law, the statute contemplates that the trial upon the merits should be had in that court. The proper practice in these cases is that followed in *Dolahanty v. Lucey*, 101 Mich. 113, and *Newcombe v. Irwin*, 55 Mich. 620, and many other cases which might be cited.

The writ will issue, directing the circuit court to set aside the order of dismissal, and to proceed with the trial of the case.

GRANT v. BOARD OF WATER COMMISSIONERS OF DETROIT.

MUNICIPAL CORPORATIONS—WATER BOARD—NEGLIGENT LAYING OF PIPE—DAMAGE TO PAVEMENT—RIGHTS OF CONTRACTOR.

A paving contractor who, after completing the paving of a city street, was put to expense in remedying depressions therein, caused by the settling of the earth around water mains laid under the direction of the board of water commissioners before the paving was begun, cannot recover against the board, as the omitted duty to pack the earth in the excavation was at most a duty owing to the public, and not to the individual who might contract to pave the street.

Error to Wayne; Waite, J. Submitted January 10, 1900. Decided February 20, 1900.

Case by Archibald Grant against the board of water commissioners of the city of Detroit for alleged negligence in laying water-pipes. From a judgment for defendant on verdict directed by the court, plaintiff brings error. Affirmed.

Edwin F. Conely and *Orla B. Taylor*, for appellant.

H. M. & D. B. Duffield, for appellee.

HOOKE, J. The plaintiff is a paving contractor. On June 15, 1891, he made a contract with the city of Detroit whereby he engaged to pave a portion of Jefferson avenue, and to keep and maintain such pavement in good condition and repair for five years. About April, 1894, he was notified by the board of public works that he must repair this pavement, on account of depressions therein, and he did so, at an expense of about \$535. It is claimed on his behalf that the depressions were caused by the failure of the water board to properly fill and settle a trench in which it laid a water-pipe previous to the time that the

plaintiff laid the pavement, by reason of which the ground settled, allowing the pavement to go down with it.

In the act creating the water board it is provided that:

"They [the commissioners] may at all times enter upon and dig up, with like restrictions as to travel, such street, alley, road, or way, to lay such pipes or construct such aqueducts and other works beneath the surface thereof, and to maintain and repair or renew the same, returning the street, alley, or way to its former condition, so far as may be." Act No. 359, 3 Laws 1873, § 8.

It is contended that a failure to restore the earth to its original condition was a neglect of duty, and that a right of action exists in favor of the plaintiff for the injury which the settling of the ground occasioned him. He accordingly brought this action, and appeals from a verdict of no cause of action directed by the court.

There were no contract relations between the water board and the plaintiff. If, as he contends, he had a right to rely upon the supposition that the street was uniformly solid and would not settle (in other words, if the city were under obligations to furnish him a foundation), he was under no obligations to make repairs made necessary by the defective foundation. On the other hand, it was competent for him to take his own risks in this respect, and apparently he supposed that he did so. The water board was required by law to fill its trench. Perhaps it could have been compelled to do so by the city, if it had omitted this duty. Nothing shows that it did not put back all of the dirt removed, nor does it appear that some of it was not afterwards removed before it had fully settled, either by the city or the contractor himself. It is evident that the complaint made is that the earth was not so packed by the employés of the board that it would not settle. But suppose this be so; this was, at most, a duty owed to the public, to be enforced by the public, and not a wrong perpetrated upon the man who might subsequently make a contract to grade or pave the highway. Counsel cite no case that sustains the plaintiff's conten-

tion, and we have found none. In our opinion, the alleged failure of the water board was not an actionable wrong to the plaintiff.

The judgment is affirmed.

The other Justices concurred.

PRESTON v. MARQUETTE COUNTY SAVINGS BANK.

BANKS AND BANKING—RIGHT TO BUY AND SELL STOCK—LIABILITY FOR ACTS OF CASHIER.

Buying and selling stock being outside the legitimate business of a bank, it cannot be held liable in trover for the conversion by its cashier of shares of stock bought for plaintiff upon a check drawn to the cashier individually, without its knowledge or authority.

Error to Marquette; Stone, J. Submitted January 10, 1900. Decided February 20, 1900.

Trover by George C. Preston against the Marquette County Savings Bank. From a judgment for defendant on verdict directed by the court, plaintiff brings error. Affirmed.

Button & Culver, for appellant.

Charles R. Brown & Son, for appellee.

GRANT, J. Action of trover for the conversion of 800 shares of stock of the Santa Fé Copper Company. One Barnes was the cashier of the defendant. In 1892 plaintiff applied to Barnes to purchase the stock. The purchase was made from Stackpole & Ely, of Boston, Mass. The stock was retained by Stackpole & Ely until June 26, 1894, when they sent the same by letter to Mr. Barnes

stating as the reason for sending it that it was of no value. This letter was addressed to Mr. Barnes individually, and the account kept by Stackpole & Ely was also with him individually. Plaintiff gave his check for the price to Mr. Barnes individually, and not as cashier. The transaction did not appear upon the books of the bank. The bank was not engaged in buying and selling stock for itself or for others. Mr. Barnes testified that, upon receipt of the stock, he kept it in his own private drawer of a desk in the bank, until he sold it, in January, 1899.

Buying and selling stocks is not a part of the legitimate business of a bank. 2 Comp. Laws 1897, § 6093, subd. 7. Under what circumstances a bank would be estopped to deny its authority to engage in such business we need not determine. There is no testimony in this case to show that the bank had been engaged in such business, or knew anything about this transaction, or that it had authorized its cashier, Mr. Barnes, to engage therein. The entire transaction was with Mr. Barnes individually, and not with the bank. For this reason the learned circuit judge properly directed a verdict for the defendant.

Judgment affirmed.

The other Justices concurred.

BOWLER v. BOWLER.

APPEAL—AFFIRMANCE OF DECREE.

A decree establishing in complainant a life estate in certain lands, being sustained by the proofs, was affirmed.

Appeal from Kent; Grove, J. Submitted January 10, 1900. Decided February 20, 1900.

Bill by Richard Bowler, Sr., against Richard Bowler, Jr., Margaret Bowler, and Edson L. O'Harrow, to establish a life estate in certain lands. From a decree for complainant, defendants Bowler appeal. Affirmed.

Wolcott & Ward, for complainant.

E. J. Doyle (C. A. Watt, of counsel), for appellants.

LONG, J. This bill was filed to establish a life interest in certain lands described in the bill in the complainant, and to declare a certain mortgage given on the premises by defendants Richard Bowler and his wife to defendant O'Harrow subject to complainant's life interest. The questions in controversy are purely of fact. We have examined the record with care, and have reached the conclusion that the circuit court was not in error. The decree made recites and provides as follows:

"The allegations in the bill of complaint in said cause in relation to the agreement between the complainant and the defendant Richard Bowler, Jr., that the said Richard Bowler, Jr., should execute to the complainant a life lease of the lands mentioned in the bill of complaint, and deeded by complainant to defendant Richard Bowler, Jr., on December 4, 1895, to wit, * * * and the allegation in said bill in relation to the preparation of such life lease, and the execution and delivery of said life lease by the defendant Richard Bowler, Jr., to said complainant, and

the subsequent loss of said life lease, are established by the proofs in the cause; and the allegation in said bill as to the knowledge of Edson L. O'Harrow, at the time of the execution of the mortgage mentioned in the said bill of complaint by Richard Bowler, Jr., and wife to the said Edson L. O'Harrow, of the rights of complainant in the land covered by said mortgage under the said life lease, and the allegations in said bill of complaint in regard to the intention of complainant at the time he erected the barn mentioned in said bill of complaint, and in regard to his right to remove the same from the land on which it was erected, are not sustained by the proofs in said cause. It is therefore ordered, adjudged, and decreed:

"*First.* That the said complainant, Richard Bowler, Sr., have all the rents, issues, profits, use, and income of the land above described from and after the said 4th day of December, 1895, and for and during the term of his natural life; and the said defendants Richard Bowler, Jr., and Margaret Bowler, his wife, are decreed and required to convey to the said Richard Bowler, Sr., all of the said land for and during the natural life of said complainant, in consideration of the conveyance made by the said complainant to the said defendant Richard Bowler, Jr., of the same lands on the said 4th day of December, 1895; such conveyance of said life estate to relate to and have effect from and after the said 4th day of December, 1895.

"*Second.* The said bill of complaint is dismissed as to defendant Edson L. O'Harrow, with costs against complainant to be taxed; and the mortgage mentioned in said bill of complaint, and executed by Richard Bowler, Jr., and Margaret Bowler, his wife, to the said Edson L. O'Harrow, upon the lands above described, is decreed to be a lien upon the life interest of complainant as well as upon the interest of the other defendants in said land, but, between the complainant and the said Richard Bowler, Jr., and wife, is decreed to be a charge upon the interest of the said Richard Bowler, Jr., in said land after the termination of the life estate of complainant therein.

"*Third.* The relief prayed in said bill in relation to the ownership, possession, and right of removal of the barn mentioned in said bill is hereby denied.

"*Fourth.* It is further ordered, adjudged, and decreed that complainant recover his costs in this cause against the said defendant Richard Bowler, Jr., to be taxed, and that he have execution therefor."

We think the proofs sustain the decree made. It must be affirmed, with costs.

The other Justices concurred.

NORTHRUP v. GRAY.

SETTLEMENT—IMPEACHMENT—LACHES.

Where G. made a settlement with N., and gave him a note for the amount due him on the basis that a certain mortgage belonged to N., he cannot, 30 years afterwards, during which time there has been another settlement on the same basis, and N. has died, claim that the mortgage belonged to him, and that he should have had credit therefor on the note.

Appeal from Newaygo; Edwards, J. Submitted January 12, 1900. Decided February 20, 1900.

Bill by Nelson W. Northrup against Edgar L. Gray and wife to foreclose a mortgage. From a decree for complainant, defendants appeal. Affirmed.

W. D. Fuller, for complainant.

Edgar L. Gray (*A. F. Tibbitts*, of counsel), for defendants.

GRANT, J. This is a bill to foreclose a mortgage for \$1,400, given by defendants to complainant on June 12, 1894, the last payment of which was due November 1, 1895. The defendants appeared by defendant Edgar L. Gray as their solicitor; were defaulted for want of answer; stipulated the amount due for principal, interest, and the taxes which defendants had failed to pay; and consented to a decree, which was duly entered October 5, 1896, and was duly enrolled. October 21, 1897, the premises were

advertised for sale, which was twice adjourned at the request of the defendants. On January 12, 1898, defendant Edgar L. Gray filed a petition asking to have the decree opened, and that he be permitted to answer, setting forth that on June 16, 1870, he was entitled to a credit of \$330 upon a promissory note for \$3,086.33, dated April 20, 1868, and given by him to Dr. Daniel W. Northrup, the father-in-law of complainant. The court granted the prayer of the petition. An answer was filed. The case was heard upon pleadings and proofs taken in open court, and decree entered for complainant for the full amount claimed, including the \$330.

Upon the death of Dr. Northrup, Mr. Gray's note became the property of complainant's wife, and he has since been her agent in the transaction. About the time the mortgage was given, Gray applied to complainant for a loan of money. It was then agreed that the amount due upon the note should be included, and a note and mortgage given to complainant to secure the amount due Mrs. Northrup and the loan made by complainant to Gray. Prior to 1868, Mr. Gray had acted as agent for Dr. Northrup, who lived in Connecticut, in loaning money. On April 20, 1868, at Newaygo, Mich., Mr. Gray and Dr. Northrup had a settlement. Upon that settlement \$977.66 was agreed upon as due to Dr. Northrup. The loans made by Gray for Dr. Northrup constituted the balance of the consideration for the note. Dr. Northrup gave Mr. Gray a receipt and agreement, which is also signed by Mr. Gray, for all notes, mortgages, and evidences of debt (excepting two, which were mentioned). The agreement also provided: "Said notes are to be paid over to D. W. Northrup when called for, or handed to him when called for; and I hereby agree to assign said mortgages to said Gray whenever he desires, having received full satisfaction for the same." Dr. Northrup died in 1872. Various payments were made by Gray, both before and after Dr. Northrup's death. Complainant furnished Gray a copy of this note with the

indorsements of payments made thereon. A settlement was again had, and \$700 found to be due thereon, which was included in the note and mortgage to complainant. Dr. Northrup owned a piece of land, which was sold to one Murray for \$600, \$300 of the purchase price being secured by a note and mortgage. This mortgage was paid to Dr. Northrup on May 15, 1871. After the expiration of nearly 30 years, after making two settlements, and after the lips of Dr. Northrup are sealed by death, defendants now seek to establish the fact that this mortgage belonged to Gray, and that he should have had credit for it upon the note of 1868. We deem it unnecessary to enter into further detail. We think the court reached the correct conclusion.

Decree is affirmed, with costs.

The other Justices concurred.

INDEX.

ABATEMENT OF SUIT—See STATUTE OF LIMITATIONS (1).

ABATEMENT, PLEA IN—See GRAND JURY (1, 3); MANDAMUS (5).

ABORTION—See CRIMINAL LAW (8); HOMICIDE.

ABUSE OF PROCESS—See INJUNCTION (2).

ACCIDENT INSURANCE—See MUTUAL BENEFIT ASSOCIATIONS (4).

ACCOUNTING.

Defendant furnished money to purchase lands sold for taxes, and complainant was to attend to the legal business connected therewith, manage the enterprise, and receive one-half of the profits on sales, after deducting the purchase price and expenses. Lands not sold were to belong to the parties equally. Complainant testified that it was understood that the properties might remain in defendant's name one year, if not sold. *Held*, in a suit for an accounting brought before the expiration of the year, that complainant was not entitled to a one-half interest in the lands except on payment of one-half of the purchase price. *Clink v. Carpenter*, 681.

See BANKS AND BANKING (1); COUNTY TREASURERS; PARTNERSHIP (1); PRINCIPAL AND AGENT (2, 5); WILLS (4, 5).

ACTIONS.

Defendant, with no malicious motive or intent, dressed himself in woman's clothes, and went at dusk to the home of plaintiff, who became frightened at his appearance, and, six weeks later, sustained a miscarriage, which she attributed to the fright. *Held*, that the fright, unaccompanied, as it was, by any immediate physical injury, could not be made the basis of a recovery of damages for a result which could not have been contemplated by defendant. *Nelson v. Crawford*, 466.

See ASSUMPSIT; CONSTITUTIONAL LAW (8); COSTS; RES JUDICATA; REVIVAL OF ACTIONS; STATUTE OF FRAUDS; VENDOR AND PURCHASER (1).

ADJOURNMENT OF COURT—See TAXATION (9).

ADVERSE POSSESSION.

1. It is not essential to adverse possession of farm land that the entire farm, including timber lands, be cleared and cultivated, but it is sufficient if it is all held as one farm, and such use is

ADVERSE POSSESSION—Continued.

made of the whole as farmers are accustomed to make of land of the character of that in question. *Henry v. Henry*, 6.

2. The possession of one who enters upon land under license from another claiming title, and who occupies the land for a series of years, doing nothing inconsistent with his holding as licensee, does not begin to be adverse until he notifies the licensor of a hostile claim. *City of St. Joseph v. Seel*, 70.
3. Where a grantee of village lots abutting on land platted as an alley, but never used or occupied as such by the public or the village authorities, takes possession of all the land his grantor claimed to own, including that so platted, and holds the same adversely for a term which, together with his grantor's term, exceeds the period of limitations, he acquires a good title as against the village, although the land platted as an alley was not literally included in his deed. *Darrow v. Village of Homer*, 229.

See HIGHWAYS; STATUTE OF LIMITATIONS (2).

ADVICE OF COUNSEL—See MALICIOUS PROSECUTION (1).

AFTER-ACQUIRED PROPERTY—See CHATTEL MORTGAGES.

AFTER-ACQUIRED TITLE—See MORTGAGES (8).

AGENCY—See PRINCIPAL AND AGENT.

ALIAS WRIT—See JUSTICES OF THE PEACE.

AMENDMENTS.

Under the statute of amendments (3 Comp. Laws 1897, § 11922), an information for uttering a forged note which sets out the signature in English, when in fact the note was signed in German, of which the translation given is incorrect, may be amended to cure the defect. *People v. Bennett*, 281.

See APPEAL AND ERROR (5, 9); CONSTITUTIONAL LAW (8).

AMPUTATION OF LIMB—See MUTUAL BENEFIT ASSOCIATIONS (4).

ANIMALS—See Dogs.

APPEAL AND ERROR.

1. An objection not made below will not be considered on appeal. *Beck v. Finn*, 21.
2. Assignments of error not mentioned in appellant's brief will be treated as waived. *Ferguson v. Wilson*, 97.
3. The nonobservance of Supreme Court Rule No. 40, prescribing the contents and arrangement of appellant's brief, is criticised. *Id.*
4. On plaintiff's appeal from a judgment for defendant on verdict directed by the court, where it appears that there was testimony entitling him to go to the jury on the main point in controversy, the court will not feel constrained to af-

APPEAL AND ERROR—Continued.

firm the judgment because of a defect in the proofs which might have been supplied had attention been called to it at the trial. So *held* where the action was on a foreign judgment, the entry of which was signed by a person as "clerk," when the rule of practice in the foreign jurisdiction required such entries to be signed by a register, local register, deputy register, or deputy clerk of the crown, and the variance was first suggested on appeal. *Patterson v. Kennedy*, 343.

5. Where judgment should have been entered against two joint defendants, but was, without objection below, entered against one only, the appellate court will treat it as having been entered against both, the trial court having authority to amend the judgment. *McPherson v. Bristol*, 354.
6. Under Sup. Ct. Rule No. 11, providing that every assignment of error shall be special, and no judgment shall be reversed for any other error than such as shall be specially assigned, assignments that the court erred in directing a verdict for plaintiff and in not directing a verdict for defendant are too general to be considered. *Jackson Bridge & Iron Co. v. Lancashire Ins. Co.*, 433.
7. Delay in perfecting an appeal, due to the stenographer's failure to furnish in time a transcript of the testimony, is not ground for dismissing it, where it appears that the appellant acted with all diligence, procuring an order for an extension of the stenographer's notes immediately after the decree was rendered. *City of Kalamazoo v. Kalamazoo Heat, Light & Power Co.*, 489.
8. Where the testimony on a bill to cancel an assignment of notes and mortgages is taken in open court, a finding by the presiding judge on disputed questions of fact, involving the capacity of complainant to transact business and the genuineness of her alleged signature, is entitled to great weight on appeal. *Frisbee v. Stewart*, 538.
9. Where an alleged defect in the form of a declaration was such that an amendment would have been permitted had the question been raised at the trial, an objection based thereon, raised for the first time on appeal, will not be considered. *Foley v. Dwyer*, 587.
10. A decree establishing in complainant a life estate in certain lands, being sustained by the proofs, was affirmed. *Bowler v. Bowler*, 698.

See EQUITY JURISDICTION (3); JUDGMENTS; MANDAMUS; RES JUDICATA (1); TITLE TO LANDS; TRIAL (4, 17, 18).

APPROPRIATIONS BY LEGISLATURE — See CONSTITUTIONAL LAW (2).

ASSAULT.

Where defendant dressed himself in woman's clothes, and went, in a spirit of fun, with no malicious motive or intent,

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ASSAULT—Continued.

to the residence of plaintiff, a neighbor, where he neither offered nor threatened violence, but merely followed plaintiff into her house, making no demonstration other than to tap the ground with a parasol, it was properly held that his conduct did not amount to an assault. *Nelson v. Crawford*, 466.

See MALICIOUS PROSECUTION (3); RAILROADS (5).

ASSIGNMENT IN BANKRUPTCY—See BANKRUPTCY.

ASSIGNMENT OF DEBT—See GARNISHMENT.

ASSIGNMENT OF INSURANCE—See LIFE INSURANCE.

ASSIGNMENT OF LAND CONTRACT—See VENDOR AND PURCHASER (2).

ASSIGNMENT OF STOCK—See CONSIDERATION (3).

ASSIGNMENTS OF ERROR—See APPEAL AND ERROR (2, 6).

ASSUMPSIT.

1. At common law, *assumpsit* may be maintained, at plaintiff's election, for the conversion of property into money or money's worth, or for the conversion of property which defendant held by virtue of contract relations with plaintiff. By statute (3 Comp. Laws 1897, §§ 11207, 11208), *assumpsit* also lies on behalf of one who has a right of action for the taking of timber or other trespass on lands, or for any other direct or consequential injury thereto. Held, that there is no authority for bringing *assumpsit* against one who merely purchased for his own use, from a trespasser, wood cut and removed from plaintiff's land. *St. John v. Antrim Iron Co.*, 68.
2. Plaintiffs, piano dealers, during the absence of defendant and his family, induced a neighbor to unlock defendant's house, and placed therein a piano, claiming that defendant's wife had agreed to receive it on trial. Defendant thereafter refused to buy the piano, or to surrender it until he should be paid for injury done by the movers to his lawn, porch, door-casing, and carpet. He never claimed to be the owner, and never refused plaintiffs possession, except conditionally, as stated. Held, that, there being no contract relation, and no conversion into money, plaintiffs were not within the rule permitting the waiving of tort and maintaining of *assumpsit* in a proper case. *Grinnell v. Anderson*, 533.
3. Under 3 Comp. Laws 1897, § 10421, providing that in all cases where, by the fraudulent representations or conduct of any person, an injury is produced for which an action on the case for fraud or deceit may by law be brought, an action of *assumpsit* shall lie upon an implied promise of the wrongdoer to pay all just damages arising from his conduct, *assumpsit* may be maintained against an agent who makes fraudulent representations to induce a purchase of his principal's land. *Hallett v. Gordon*, 567.

See COSTS; RES JUDICATA (2).

ASSUMPTION OF RISK—See MASTER AND SERVANT; NEGLIGENCE (1).

ATTACHMENT.

The fact that property seized on attachment for a debt of \$1,150 was inventoried at \$4,400 does not show that the levy was so excessive as to defeat plaintiff's rights under the writ. *Kompass v. Light*, 86.

See MALICIOUS PROSECUTION (1, 2).

ATTEMPTS—See CRIMINAL LAW (6, 7).

AUDITORS, BOARD OF STATE—See CONSTITUTIONAL LAW (1, 3).

BANKRUPTCY.

1. Where a petition in bankruptcy was held insufficient, but, on amendment, was made the foundation of the proceedings, the assignment related back to the date of the filing of the original petition, and vested the assignee with the title to property then held by the bankrupt, as against a transferee from the bankrupt prior to the filing of the amended petition. *Potter v. Martin*, 542.
2. A sale of property by an assignee in bankruptcy is not invalid because not made until six years after the order of sale. *Id.*
3. Whether confirmation of a sale by an assignee in bankruptcy is essential to its validity,—*quære*; the court inclining to the view that it is not. *Id.*
4. Where the record in bankruptcy proceedings in a federal court showed that they were still pending on an application for the confirmation of the sale of the assigned property, a grantee of the property from the bankrupt could not assert title against the assignee's grantee in a suit to quiet title in a state court, since, even if the latter acquired no title, the property was in the control of the federal court. *Id.*

See STATUTE OF LIMITATIONS (2).

BANKS AND BANKING.

1. A bill will lie in equity, on behalf of an insolvent bank, to compel the directors to account for losses sustained by reason of their negligent administration of the bank's affairs; and it may be brought by any shareholder, where the receiver is a director, and therefore a proper defendant to the bill. *Flynn v. Third Nat. Bank of Detroit*, 642.
2. Buying and selling stock being outside the legitimate business of a bank, it cannot be held liable in trover for the conversion by its cashier of shares of stock bought for plaintiff upon a check drawn to the cashier individually, without its knowledge or authority. *Preston v. Marquette County Sav. Bank*, 696.

See BILLS AND NOTES; MORTGAGES (4, 5).

BILL OF REVIEW—See MORTGAGES (7).

BILLS AND NOTES.

When a consignor forwards for collection, without other instructions, a sight draft, to which is attached a bill of lading showing a consignment to himself, indorsed by him in blank, the presumption is that he does not intend credit, but that it is a cash transaction, requiring payment by the drawee of the draft before delivery to him of the bill of lading; which presumption is not negatived by the fact that the draft is entitled to three days' grace, and is considered in law as a time draft. *W. & A. McArthur Co. v. Old Second Nat. Bank of Bay City*, 223.

See CONSIDERATION (1, 3, 4); FORGERY (2); MORTGAGES (4, 5).

BILLS OF LADING—See **BILLS AND NOTES**.

BOARD OF STATE AUDITORS—See **CONSTITUTIONAL LAW** (1, 3).

BOARDS OF EDUCATION—See **MUNICIPAL CORPORATIONS** (5, 6).

BOARDS OF REVIEW—See **TAXATION** (6-8).

BOARDS OF SUPERVISORS—See **TAXATION** (5, 6).

BOARDS OF WATER COMMISSIONERS—See **MUNICIPAL CORPORATIONS** (19).

BOILER EXPLOSIONS—See **CRIMINAL LAW** (9-11); **EVIDENCE** (5-8).

BONA FIDE PURCHASERS—See **CONSIDERATION** (3); **CORPORATIONS** (9).

BONUS GIVERS—See **CORPORATIONS** (1-7).

BREACH OF CONTRACT—See **DAMAGES** (2-4).

BRIBERY—See **LIBEL AND SLANDER** (2).

BRIEFS OF COUNSEL—See **APPEAL AND ERROR** (2, 3).

BURDEN OF PROOF—See **MUNICIPAL CORPORATIONS** (7).

BURGLARY—See **CRIMINAL LAW** (7).

BY-LAWS—See **CORPORATIONS** (9); **MUTUAL BENEFIT ASSOCIATIONS** (1, 4).

CARRIERS—See **RAILROADS; STREET RAILWAYS**.

CASHIER, AUTHORITY OF—See **BANKS AND BANKING** (2).

CERTIORARI—See **MANDAMUS** (1).

CHATTEL MORTGAGES.

A chattel mortgage securing the payment of a specified sum annually for a number of years, which covers specified chattels, and provides that it shall also cover "all other personal property that may be owned or acquired during such years," is void, as to subsequent good-faith purchasers or attaching

CHATTEL MORTGAGES—Continued.

creditors, so far as it attempts to create a lien upon after-acquired property having no connection with that owned by the mortgagor at the time of the giving of the mortgage. *Ferguson v. Wilson*, 97.

CHECK, PAYMENT BY—See TAXATION (13).

CITIES AND VILLAGES—See MUNICIPAL CORPORATIONS.

COLLATERAL ATTACK—See TAXATION (12).

COMMERCIAL PAPER—See BILLS AND NOTES.

COMMON CARRIERS—See RAILROADS; STREET RAILWAYS.

CONDUCT OF COUNSEL—See TRIAL (5, 8, 9, 11, 17).

CONFIRMATION OF MORTGAGE—See ESTATES OF DECEDENTS (3).

CONFIRMATION OF SALE—See BANKRUPTCY (3).

CONFLICT OF LAWS.

In the absence of reported cases showing the law of a foreign jurisdiction respecting the validity of a service of summons by an infant, such service may be upheld in our courts, in an action on a judgment rendered in such jurisdiction, upon the testimony of an attorney there residing that it accords with the common practice. *Patterson v. Kennedy*, 343.

CONSIDERATION.

1. Where demand negotiable notes were given for the sale of an insolvent's stock, and the buyer paid a debt of the insolvent, on which he was liable as surety, it cannot be said that the sale was without consideration. *Gordon v. Alexander*, 107.
2. A release given by a brakeman to a railroad company, reciting that he had received certain injuries, and that, to avoid litigation, he, in consideration of re-employment by the company for such time as might be satisfactory to it, released such company from all claims for damages for such injuries, is without consideration, where he was, at the time it was given, in the employ of the company. *Potter v. Detroit, etc., R. Co.*, 179.
3. A creditor who accepts from his debtor a note for the amount due, payable on demand, together with shares of corporate stock assigned as collateral, obtains no more than the shareholder's equity in the stock, though he agrees by parol to forbear bringing suit for a time in consideration of its receipt; since, the parol agreement being incompetent to be shown in the event of immediate suit upon the note, there is no sufficient consideration for the assignment. *Bronson Electric Co. v. Rheubottom*, 608.
4. A promise to pay interest on an interest-bearing note after maturity until the note is paid is not a sufficient consideration to support an agreement by the payee to extend indefinitely

CONSIDERATION—Continued.

the time of payment, so as to discharge a surety thereon.
Shayler v. Giddins, 659.

See EXECUTION; FRAUDULENT CONVEYANCES.

CONSIGNOR AND CONSIGNEE—See BILLS AND NOTES.

CONSTITUTIONAL LAW.

1. A joint resolution of the legislature authorizing the board of state auditors to investigate the claim of innocence of one who was legally convicted of a crime, and who served in prison a part of the sentence imposed upon him, and to allow him, if it find his innocence established, a money compensation, is void as creating, in effect, a court of appeals other than the judicial ones authorized by the Constitution. *Allen v. Board of State Auditors*, 324.
2. The two-thirds vote of the legislature, essential under article 4, § 45, of the Constitution, to the validity of any "bill appropriating the public money or property for local or private purposes," is equally requisite where such an appropriation is attempted by joint resolution. *Id.*
3. A petition for compensation by a citizen who served a term in prison for a crime of which, it is alleged, he was innocent, is not a "claim" which the board of state auditors may be authorized to pass upon under article 8, § 4, of the Constitution, creating such board "to examine and adjust all claims against the State;" claims, within the meaning of such provision, embracing only demands based on legal grounds. *Id.*
4. Act No. 408, Local Acts 1899, entitled "An act to transfer to the city of Detroit the title to all the property, of every name and nature, now owned, operated, and controlled by the board of water commissioners of the city of Detroit under [an act of 1853 and amendments], and to give to said city of Detroit the possession, control, and operation and management of said property," and embracing provisions for the supplanting of the existing system of waterworks, supported by a levy of water-rates upon all consumers, by a system involving free water to the municipality and for domestic consumption, to be provided for by a general tax levy, is in contravention of article 4, § 20, of the Constitution, providing that no law shall embrace more than one object, which shall be expressed in its title. *Blades v. Board of Water Com'rs of Detroit*, 366.
5. The provisions of section 9 of Act No. 408, Local Acts 1899, which constitute the mayor and certain other officers of the city of Detroit a board for the purpose of estimating annually, and reporting to the common council, the amount of money which they deem a just proportion of the total amount required for the support of the waterworks, as previously determined by the council and board of estimates, for the expense of furnishing water for domestic and other specified uses, and which provide for the levy and assessment of the proportionate amount so reported upon the taxable property of the city,

CONSTITUTIONAL LAW—Continued.

- without submission to the board of estimates or to a vote of the freemen, are unconstitutional and void, as imposing taxation for a purely local purpose without the consent of the electors or their chosen representatives. *Id.*
6. The provision of section 6 which contemplates an assessment against the individual lot-owner of his proportionate share of the cost of laying water-pipe in the block in which his lot is situated, such proportion to be ascertained "by finding the ratio which the narrowest frontage of said lot bears to the entire frontage on both sides of the street or alley in the block," is also illegal. *Id.*
 7. The unconstitutional scheme of taxation provided for in sections 6 and 9 of Act No. 408, Local Acts 1899, is so interwoven with the entire frame of the act, that the whole act must fall. *Id.* 367.
 8. Article 4, § 28, of the Constitution, which provides that no new bill shall be introduced into the legislature after the first 50 days of a session shall have expired, does not render invalid a section attached to a bill after the expiration of the 50-day period, if the bill itself was introduced in time, and the section was a proper one to be embodied in the bill. So held with reference to the provision of Act No. 463, Local Acts 1895, amendatory of the Detroit city charter, limiting the time within which actions may be brought for negligent injuries. *Renackowsky v. Board of Water Com'rs of Detroit*, 618.

CONSTRUCTIVE NOTICE—See MUNICIPAL CORPORATIONS (2); NOTICE.

CONTINUING TRESPASS—See EQUITY JURISDICTION (1).

CONTRACTS.

1. Evidence reviewed, and held not to establish an alleged agreement by defendant to purchase, through complainant, certain timber lands on which complainant claimed to have an option. *Seymour v. Canfield*, 212.
2. A contract in writing, complete upon its face, for the installation of a heating apparatus, guaranteed to warm a dwelling to a specified temperature, cannot be varied by parol evidence that it was based on the owner's statement and understanding that he would build a stone wall under the building to be heated. *Mouat v. Montague*, 334.
3. A provision of a contract for the sale of one's right, title, and interest in a certain business, whereby the seller agrees not to re-engage in such business, is not void for failure to limit the place wherein he is restrained from operating, if, construed in the light of the surrounding circumstances, it is apparent that only a reasonable limitation was intended. *Buck v. Coward*, 530.
4. By consenting that the seller re-engage in business, and allowing him to carry on such business for nearly three

CONTRACTS—Continued.

years without objection, the purchaser waives the right thereafter to insist upon the observance of the provision. *Id.*

5. One who signed, without reading, a contract which provided unconditionally for the purchase of a nickel-in-the-slot musical instrument, knowing that the contract was to be forwarded by the agent who took the order to the dealers, cannot show, in defense to an action for the price, a prior parol agreement between the agent and himself that he should take the instrument and operate it upon commission. *Price v. Marthen*, 655.
6. Where plaintiff assigned a mortgage to defendant on his agreement to pay plaintiff accumulated interest out of the first interest that should be paid on the debt, and defendant was compelled to foreclose the mortgage for nonpayment of interest, and realized less than the principal sum due, plaintiff was not entitled to recover such back interest. *Collins v. Gordon*, 665.

See ASSUMPSIT; CONSIDERATION; DAMAGES (2-4); EVIDENCE (4, 10-12); INTEREST; MUNICIPAL CORPORATIONS (7, 8); PARTIES (3, 4); PRINCIPAL AND AGENT (1); RAILROADS (1); TOWNSHIPS; VENDOR AND PURCHASER.

CONTRIBUTORY NEGLIGENCE.

1. Where plaintiff, instead of taking advantage of paths to and from the street which would enable pedestrians to avoid an icy place in the sidewalk, which plaintiff knew to be dangerous, attempted, though with caution, to walk across the ice, she was guilty of contributory negligence, precluding a recovery for injuries sustained in falling upon the ice. *Howey v. Fisher*, 43.
2. Mere previous knowledge of a hole in a sidewalk does not render one who was injured because of it guilty of contributory negligence in failing to avoid it, without regard to his having it in mind at the time, or to the care which he was exercising. *Urtel v. City of Flint*, 65.
3. Plaintiff stopped his horses 93 feet from a railroad crossing, and looked and listened, but neither saw nor heard an approaching train. He did not look again, but told his 15-year-old daughter to keep watch, and she appeared to him to be doing so. They were struck by a train which must have been visible to the daughter, had she looked, from any point within 75 feet of the crossing. The statutory signals, it was claimed, were not given. *Held*, that plaintiff could not recover. *Tucker v. Chicago, etc., R. Co.*, 149.
4. The fact that one approaching a railroad crossing knows that it is not the scheduled hour for any train does not relieve him of the duty to look and listen, he being chargeable with notice that trains often run behind scheduled time. *Id.*
5. An employé of a railroad company, who, on a dark night, assisted in moving a detached way-car along a siding by pushing against a hand-rail on the front platform while he walked

CONTRIBUTORY NEGLIGENCE—Continued.

- beside the car, was guilty of contributory negligence in running against a coal-bin built close to the siding, where he might have seen the obstruction, had he looked out for it, at a distance of 10 feet. *Pahlan v. Detroit, etc., R. Co.*, 233.
6. It cannot be said, as a matter of law, that a shipmaster was guilty of negligence, precluding a recovery against a dock-owner for injury to a vessel caused by the giving way of a snubbing-post improperly braced, although the post gave indications of giving way two hours before the accident, where the master testifies that it was dark and stormy at the time, that all the lines were out, and that he was unable to get to them after dark. *Michaud v. Grace Harbor Lumber Co.*, 305.
 7. A tenant who remained in leased premises after knowledge that the plastering was defective, and that some of it had fallen, was not guilty of contributory negligence, precluding a recovery from the landlord of damages resulting from falling plaster after he had promised to make all necessary repairs where she had had no previous experience with defective plaster, and was acting in the belief that the landlord would tear off the defective plastering if it was dangerous. *Mason v. Howes*, 329.
 8. The duty of one about to cross a railroad track, to look and listen for approaching trains, is not discharged by stopping his horse 30 feet from the track, and looking and listening, but he should look and listen for the entire distance; and where one, after so stopping, rode the 30 feet in a closed carriage, paying no heed to the light cast upon the track by the headlight of an engine, for the reason that he thought it the reflection of an electric lamp located 400 feet away, he was guilty of contributory negligence, precluding a recovery for injuries caused by the train's striking him at the crossing. *Britton v. Michigan Cent. R. Co.*, 360.

See MASTER AND SERVANT (7); NEGLIGENCE (3); RES JUDICATA (1).

CONVERSION—See ASSUMPSIT (1, 2).

CORPORATIONS.

1. In a controversy between subscribers to a bonus fund for a corporation and a stockholder to whom the corporate property has been deeded to secure him for advances, the conditions of a private arrangement under which the mortgagee became a stockholder are immaterial. *Moore v. Universal Elevator Co.*, 48.
2. Subscribers to a bonus fund for a corporation have a right to assume that the subscriptions to its capital stock were made in good faith, and that they will be paid in money or in money's worth. *Id.*
3. Where a director in a corporation, who, though not a *bona fide* stockholder, is held out as such, neglects to examine into the value of property turned over to it in payment of stock subscriptions, and such property proves to be worthless, as

CORPORATIONS—Continued.

between him and those who subscribed to a bonus on the faith of his connection with the corporation, he must be the loser, and he cannot defend upon the ground that he was not an actual stockholder. *Id.*

4. Where corporators, having agreed, in consideration of a bonus subscription, that a stated amount of the capital stock should be immediately subscribed, that a building should be erected and equipped for manufacturing, and that the business should be in active operation within a stated time, procured no *bona fide* subscriptions to the capital stock, but, in lieu thereof, turned in property at a grossly excessive valuation, equipped the building erected by them with machinery the title to which was retained in the vendors, and failed entirely to put the business into active operation, they were not justified in resisting the claims of the bonus subscribers upon the ground that their subscriptions were not paid in full. *Id.*
5. The fact that a corporation just organized secures a director for advances by a deed to its property, and also gives a deed to the same premises to secure the bonus givers, before it has fairly commenced the business for which it was organized, does not constitute the failure in business contemplated by Act No. 144, Pub. Acts 1895, § 6, providing that, in case of the failure of a corporation, bonus givers shall become creditors to the amount contributed. *Id.* 49.
6. The lien of a director of a corporation under a mortgage given by it to secure him for advances will be held inferior to that of bonus givers, claiming under a trust deed of the same property, where the bonus subscriptions were induced by fraudulent representations concerning the capital stock, for which representations the director, even if ignorant of the fraud, was, under the circumstances of the case, responsible. *Id.*
7. It is not necessary for a defrauded subscriber to a bonus fund, having possession of the corporation's property under a deed executed to secure him, to exhaust his claim against the corporation by suit, judgment, and execution returned *nulla bona*, where he is a party defendant to a suit by a director to foreclose an alleged prior lien, all parties interested being before the court. *Id.*
8. That a mortgage given by the officers of a corporation to secure certain of its outstanding obligations was not strictly within the terms of the resolution of the stockholders authorizing a mortgage to be given, the resolution apparently contemplating a new loan, can be taken advantage of only by the corporation or its stockholders; therefore, where the stockholders see fit to waive the departure, and to recognize the instrument as valid, an execution creditor of the corporation is not in position to raise the question, when brought in as a party defendant upon a bill to foreclose the mortgage. *Citizens' State Bank of Sturgis v. McGraft Lumber Co.*, 573.
9. A by-law creating a lien on stock for debts of the stockholder to the corporation is valid, though not binding as against innocent purchasers for value. *Bronson Electric Co. v. Rheubottom*, 608.

CORPORATIONS—Continued.

10. Upon a prosecution for embezzlement, proof that respondent receipted for certain moneys as treasurer of an association, and that the moneys were intended by the depositor to be applied to the purchase of stock therein, sufficiently shows that the moneys belonged to the association. *People v. Carter*, 668.
11. Where an attempt was made by an association to organize a corporation under a state law, and articles of association were prepared, and the incorporators assumed to do business as a corporation, the association became a corporation *de facto*, within 3 Comp. Laws 1897, § 11591, punishing embezzlement from an "incorporated company." *Id.*

See BANKS AND BANKING; EMBEZZLEMENT (3); MORTGAGES.

COSTS.

The fact that a recovery was had in an action of replevin for such part of the goods described in the writ as were in defendant's possession when the writ was sued out should not deprive plaintiff of his right to costs on prevailing in a subsequent action of *assumpsit* for the value of the rest of the goods. *Reid, Murdoch & Co. v. Parks*, 363.

See EJECTMENT.

COUNSEL, ARGUMENT OF—See TRIAL (5, 6, 8, 9, 11, 17).

COUNTY TREASURER.

1. Where, in an action on a county treasurer's bond, evidence concerning certain settlements between the treasurer and the board of supervisors was submitted to the jury, counsel should have been permitted to argue before the jury the question of the weight to be attached to such evidence. *County of Montgomery v. Putnam*, 581.
2. Such settlements, at least annually, being provided for by 1 Comp. Laws 1897, § 2479, are *prima facie* evidence of the state of the account, either party, however, being at liberty to show fraud, mistake, or omission. *Id.*
3. Evidence that payments had been made to and by the treasurer which were not credited in the settlements affects only the weight to be given to them as *prima facie* evidence of the state of his account. *Id.*

COUPON TICKETS—See RAILROADS (5); STREET RAILWAYS (7).

COURTS—See BANKRUPTCY (4); CONSTITUTIONAL LAW (1); EQUITY JURISDICTION; PROBATE COURTS.

COVENANTS—See LANDLORD AND TENANT (3, 4); MORTGAGES (8); VENDOR AND PURCHASER.

CREDIBILITY OF WITNESSES—See EVIDENCE (12); WITNESSES (2).

CRIMINAL LAW.

1. 3 Comp. Laws 1897, § 11786, provides that, when a person convicted of crime shall have been twice before sentenced in the State to imprisonment at hard labor for not less than one year each time, he shall be sentenced to imprisonment at hard labor for life, or for not less than seven years in addition to the punishment prescribed for his last conviction. Section 11924 provides that in statutory offenses, or any offense for which a statute fixes the punishment, the indictment shall be held sufficient, after verdict, to warrant the punishment prescribed by the statute, if it describes the offense in the words of the statute. Respondent was convicted of larceny from a dwelling under an information which charged two former convictions in the language of section 11786, and sentence was imposed under the provisions of that statute, the former convictions being admitted by respondent in open court. *Held*, that, if the information was defective in failing to state the times and places of the former convictions (a point not decided), it was good after verdict. *People v. Butler*, 35.
2. A complaint for a violation of Act No. 63, Pub. Acts 1893, § 1, making it unlawful for any person to practice dentistry unless he has received a certificate from the State board of examiners, "provided," that the act shall not apply to "any person who is now located and lawfully in actual practice" in the State, need not negative the exemption contained in the proviso. *People v. Allen*, 123.
3. On a prosecution for uttering a forged agreement to pay money, admitted to have been signed by the purported makers, but claimed by them to have been altered by respondent before being uttered, it was error to permit the prosecution to go into the question of the consideration for the agreement, and to show respondent's default with respect thereto. *People v. Bennett*, 282.
4. A respondent is not entitled to present evidence sustaining his reputation for truth and veracity until the same has been attacked by the prosecution. *People v. Smith*, 285.
5. The fact that the trial judge, in a prosecution for rape, failed to call the attention of the jury to the testimony of respondent, denying the charges of the complaining witness and of other witnesses, who testified that he had admitted the crime, while instructing them that the testimony of the latter witnesses, if believed, would tend strongly to establish respondent's guilt, does not warrant the reversal of a conviction, where no request for such instructions was preferred by his counsel. *Id.*
6. To constitute an attempt, at common law, something more than an intention or purpose to commit crime is necessary; and this is not changed by the statute (3 Comp. Laws 1897, § 11784) prescribing a punishment for one who shall attempt to commit a crime, and in such attempt shall do any act towards the commission of the offense, but shall fail in the perpetration, or shall be intercepted or prevented in the execution, of the same. *People v. Youngs*, 292.

CRIMINAL LAW—Continued.

7. One should not be convicted of an attempt to break and enter a dwelling upon evidence merely that he left his home, and met, by prearrangement, a supposed confederate at a saloon on the way to the dwelling, and after loading his revolver there, and procuring extra cartridges for it, went to a drug-store and bought chloroform, which, with carpet slippers and the weapon, was found on his person by the officers who arrested him as he came out of the store. *Id.*
8. Upon a prosecution for manslaughter, where the evidence is conclusive that a criminal abortion was procured, the issue is whether or not the respondent procured the abortion, the guilty knowledge or intent of the person committing the crime being deducible from the crime itself; therefore, testimony as to what respondent did when applied to upon a certain occasion to produce an abortion upon witness, offered for the alleged purpose of showing the intent, is irrelevant, and its admission reversible error. *People v. Lonsdale*, 388.
9. On the trial of an indictment for manslaughter, charging that the killing resulted from a steam-boiler explosion, caused by overpressure of steam, due to the willful negligence of the respondent in failing to regulate the safety-valve, and in leaving the boilers unattended, where experts' testimony that the explosion was due to the causes alleged was contradicted by respondent's witnesses, who testified that the explosion was due to other causes, and that the respondent could have done nothing to avoid it if present, it was proper to submit the issues raised by the testimony to the jury, though the people's witnesses did not have that technical scientific knowledge possessed by the witnesses for the defense. *People v. Thompson*, 412.
10. While it was not error, upon a prosecution for manslaughter in leaving steam-boilers unattended until the pressure produced an explosion causing the death of a person named in the indictment, to show that other persons were killed or injured by the explosion, it was improper to admit testimony in regard to the injured persons' being taken to hospitals, and detained there for a long time. *Id.* 413.
11. Where respondent in a prosecution for manslaughter was accused of negligently leaving steam-boilers unattended until the pressure produced an explosion causing death, he was entitled, in addition to the general charge, in the main correct, as to what would amount to culpable negligence, to have given a requested instruction that if he had reason to believe, and did believe, from his past experience, that it was consistent with safety for him to be absent from the boilers at the time, he could not be held guilty of the crime. *Id.*
12. Where the jury in a criminal case showed themselves unwilling to render a verdict in accordance with an instruction that it was their duty, under the evidence, to find the respondent guilty, it was reversible error for the court to state to them that there was nothing for them to do but to comply with the direction of the court, and that they violated their

CRIMINAL LAW—Continued.

oaths as jurors when they set up their individual opinions against the court's instructions. *People v. Warren*, 504.

See AMENDMENTS; CONSTITUTIONAL LAW (1, 3); EMBEZZLEMENT; EVIDENCE (5-9); FALSE PRETENSES; FORGERY; GRAND JURY; RAPE; TRIAL (6, 15).

CROPS—See INJUNCTION (2).

CUSTOM.

A general custom among manufacturers of screening the small circular saws in use on equalizing machines is not shown by the testimony of a single witness that it is customary to screen such saws, and that he has seen screening devices in use on equalizing machines in another State, but never in this State. *Journeaux v. E. H. Stafford Co.*, 396.

DAMAGES.

1. Where, in an action of trover, it appeared that plaintiff and defendant had each contracted with a logger and sawyer for the delivery of a specified number of railroad ties, and that defendant had paid the seller for, and appropriated to his own use, ties manufactured from plaintiff's logs and delivered upon plaintiff's contract, the value of the ties, and not of the logs before they were made into ties, was the proper measure of damages. *Saltmarsh v. Chicago, etc., R. Co.*, 103.
2. Plaintiffs, having contracted to put down a drive well for defendant—a well that defendant could not pump dry—at a specified price per foot, and having made four borings, and abandoned each because of obstructions, cannot, when prevented by defendant from proceeding with a fifth boring, recover, as part of their damages for breach of contract, the cost of the four unsuccessful borings. *Reynolds v. Levi*, 115.
3. Where fruit trees are bought to be set out on an agreement that they shall be of certain varieties, or others equally desirable, and, on commencing to bear, they are found to be of an inferior variety, the measure of damages is the value that would have been added to the premises if they had been of the varieties contracted for. *Heilman v. Pruyn*, 301.
4. In an action to recover damages for selling plaintiff fruit trees of a variety inferior to those ordered by him, it cannot be shown in defense that the breach of contract was harmless for the reason that the trees were winter-killed after the commencement of suit. *Id.*
5. In an action against a railroad company for ejecting a passenger from its train because of his refusal to pay a fare which had already been declared excessive in a suit brought by him against the company, and then pending on appeal,—the distance between the points being agreed upon, and the statute fixing the rate per mile which the company might lawfully charge,—it was not error to permit the records and files of the former suit to be introduced in evidence, they being proper to be considered by the jury, as bearing upon

DAMAGES—Continued.

the willful nature of the wrong, in determining the damages to be awarded. *Chamberlain v. Lake Shore, etc., R. Co.*, 477.

6. Where a passenger was wrongfully ejected from a train in the presence of 30 to 35 passengers, and was compelled to walk 5 miles, \$650 damages were not excessive. *Id.*

See ACTIONS; EQUITY JURISDICTION (1); EVIDENCE (3); LIBEL AND SLANDER (3).

DEBTOR AND CREDITOR—See CONSIDERATION (3); ESTATES OF DECEDENTS (2, 3).

DECEIT—See ASSUMPSIT (3).

DEEDS.

1. Where a husband attempts to convey land to his wife without consideration, believing she would thereby be enabled to qualify as surety upon his liquor bond, and the conveyance fails on account of a misdescription, an execution against him, levied on the land sought to be conveyed, will stand, although the wife seeks in equity to reform the deed *Balch v. Jaycox*, 624.
2. Where a mortgagor's vendor owned only the N. W. $\frac{1}{4}$ of the S. W. $\frac{1}{4}$ and the S. E. $\frac{1}{4}$ of the S. W. $\frac{1}{4}$ of a section of land, but his deed to the mortgagor described the land as the N. W. $\frac{1}{4}$ and the S. E. $\frac{1}{4}$ of the S. W. $\frac{1}{4}$ of such section, and the mortgage, and a quitclaim deed thereafter given by the mortgagor to the mortgagee, contained the same description (the mortgagor having only taken possession of the two 40-acre tracts which his grantor in fact owned, and not having claimed title to any other lands, and the mortgage further stating that the description contained 80 acres), the mortgagor's grantor was entitled to have his deed reformed so as to describe correctly the land intended to be conveyed, and to have the last grantee enjoined from maintaining an action against him for breach of covenant, based on the failure of title to the N. W. $\frac{1}{4}$ of the section. *Davis v. Benedict*, 657.

See ADVERSE POSSESSION (3); EVIDENCE (1, 2); EXECUTION FRAUDULENT CONVEYANCES; HOMESTEAD (1, 2); MORTGAGES (1, 8); RAILROADS (6).

DE FACTO CORPORATIONS—See CORPORATIONS (11).

DEFICIENCY—See MORTGAGES (7).

DEMAND—See EMBEZZLEMENT (2); ESTOPPEL (3).

DEMURRER—See EQUITY PLEADING (2, 3); PLEADING (4).

DENTISTRY, COMPLAINT FOR UNLAWFUL PRACTICE OF—
See CRIMINAL LAW (2).

DESCRIPTIONS—See DEEDS; MORTGAGES (8); WITNESSES (2).

DIRECTING VERDICT—See CRIMINAL LAW (12).

DISCONTINUANCE—See EJECTMENT; JUDGMENTS.

DISSOLUTION OF INJUNCTION—See MANDAMUS (3, 4).

DIVORCE.

A decree of divorce, based on conflicting testimony taken in open court, was affirmed. *Karreman v. Karreman*, 654.

See MARRIAGE.

DOGS.

Where the owner of sheep is informed that a sheep-killing dog, which has previously worried sheep belonging to him, is within his inclosure, unaccompanied by its owner or other person, he is justified in having his informer shoot the dog, without waiting to see if it is again going to chase his sheep. *Throne v. Mead*, 278.

DOWER.

1. Under 3 Comp. Laws 1897, § 8918, giving the widow dower in all lands whereof her husband was seised of an estate of inheritance at any time during the marriage, a wife is not dowerable in lands held by her husband under contract of purchase, the legal title remaining in the vendor. *Stephens v. Leonard*, 125.

2. A contract purchaser of land, at whose direction the vendor conveys the land to a third person as security for money to complete payment of the purchase price, is not seised of a legal title, so as to entitle his wife to dower therein. *Id.*

DUPLICITY—See FALSE PRETENSES (2).

DURESS—See EVIDENCE (4).

DYING DECLARATIONS—See HOMICIDE.

EASEMENTS—See MUNICIPAL CORPORATIONS (3, 4).

EJECTMENT.

Under 3 Comp. Laws 1897, § 11260, which provides that, in all actions in which the plaintiff would be entitled to costs upon a judgment rendered in his favor, if, after the appearance of the defendant, such plaintiff shall discontinue his suit, the defendant shall have judgment for "his full costs," a defendant in ejectment who takes a new trial under the statute, and who subsequently has judgment upon discontinuance by the plaintiff, while not entitled to have taxed against the plaintiff the costs paid in compliance with the statutory requirements giving a new trial, is entitled to recover the costs of the first trial, including his attorney's fees for that trial, and the stenographer's and witness fees. *Whiteley v. Ingham Circuit Judge*, 617.

ELECTION OF COUNTS—See PLEADING (2).

ELECTRIC LIGHTING—See MUNICIPAL CORPORATIONS (3, 4, 7).

EMBEZZLEMENT.

1. Under 3 How. Stat. § 9263a, making it a felony for any public officer knowingly and unlawfully to appropriate to his own use, or to the use of any other person, money received by him in his official capacity, and section 9263c, providing that the failure of any such officer to pay over to his successor all moneys which should be in his hands as such officer shall be *prima facie* evidence of the offense, it is not necessary, to constitute the offense, that the unlawful appropriation should be with an intent to forever exclude the rightful owner from use and possession. *People v. Warren*, 504.
2. Omission to prove a demand for money alleged to have been embezzled is not fatal where the accused absconded after receiving the money, and admitted that the money had been lost on the races. *People v. Carter*, 668.
3. Upon a prosecution for embezzlement from a corporation, it is sufficient to show that the property embezzled was the property of a corporation *de facto*. *Id.*

See CORPORATIONS (10, 11); EVIDENCE (9).

EQUITY JURISDICTION.

1. Where complainant was the owner of improvements along certain rivers, constructed for the purpose of driving logs down such rivers, and defendants, by force, seized such improvements, and retained them for several weeks, and proposed to retain them during an entire logging season, and were using them in such manner that lands belonging to complainant were damaged, and liable to suffer further damage, the trespass being a continuing one, complainant was entitled to equitable relief by injunction and assessment of damages. *Hall v. Nester*, 141.
2. That an insurance company's bill to cancel a policy for fraud of the insured, and to enjoin the beneficiary from prosecuting a pending action at law thereon, alleges that complainant has assumed to cancel and annul the policy, does not show that it was unnecessary for the company to invoke the aid of equity, it being evident that the validity of the company's attempt at cancellation is denied, and must be determined by the courts. *Mactavish v. Kent Circuit Judge*, 242.
3. Relator brought an action on a fraternal society's benefit certificate. Subsequently the society filed a bill in the circuit court of another county to cancel the certificate on the ground that it was procured by fraud, and the latter court, sitting as a court of equity, enjoined the prosecution of the action at law pending the determination of the suit in equity. *Held*, that the circuit court of such other county, sitting in equity, had power, in its discretion, to issue such injunction, and that its action in so doing could not be reviewed by the Supreme Court. *Id.* 243.

See BANKS AND BANKING (1); CORPORATIONS (7); MORTGAGES (3).

EQUITY PLEADING.

1. Where, on a bill to quiet title against a grantee from an assignee in bankruptcy, the answer alleged facts showing that defendant had been in possession for five years, it was sufficient to raise the question of such limitation, though it did not in terms plead 8 How. Stat. § 8698, subd. 1, by which such limitation is imposed. *Potter v. Martin*, 542.
2. A bill in equity will not be held bad, on demurrer, for multifariousness, unless the defect is pointed out in the demurrer. *Flynn v. Third Nat. Bank of Detroit*, 642.
3. A general demurrer to a bill cannot be sustained where there is matter in the bill upon which any equitable relief can be granted. *Id.*

See MANDAMUS (3, 4).

EQUITY PRACTICE—See ACCOUNTING; APPEAL AND ERROR (7, 8, 10); INJUNCTION; LACHES; MORTGAGES (6, 7); PARTNERSHIP (1).

ESTATES OF DECEDENTS.

1. Under 3 Comp. Laws 1897, § 9322, subd. 4, providing that, if the inventory of an intestate estate shows that it does not exceed in value \$150 over and above the allowances to the widow, the probate court may, by a decree for that purpose, assign the entire estate for her use and support, she acquires no property rights in such residue until the proper order is made by the probate court. *Stanton v. Foster*, 219.
2. Though an executor, as the residuary legatee in the will, may give, in lieu of the ordinary bond, a bond conditioned only to pay the debts and legacies, under 3 Comp. Laws 1897, § 9312, his right of disposition of the property is subject to the authority of the probate court to compel the application of the property to the payment, ratably, of the decedent's debts, in case the executor fails to provide for them from other sources; therefore it is improper, where there is a deficiency of assets, for such an executor to mortgage the property, or to apply the proceeds of a sale thereof, in such manner as to work preferences among the creditors. *In re Vedders' Estate*, 439.
3. Where it appeared on petition for confirmation of a mortgage given to a creditor of the estate by an executrix who was a residuary legatee, and had given bonds as such under 3 Comp. Laws 1897, § 9312, that, while the license to mortgage granted by the probate judge provided that the mortgage should be for a stated amount and be subject to all existing incumbrances, the land being already mortgaged by the executrix to another creditor, the mortgage as drawn was for a greater amount and omitted the provision as to incumbrances, the probate court properly held the variance material and refused to confirm the mortgage. *Id.*

See DOWER; PARTNERSHIP (1); WILLS; WITNESSES (1).

ESTOPPEL.

1. Where a mortgagee withdrew the mortgage and note from the possession of a bank which had acted as his general agent for collection, and notified the mortgagor of the termination of the agency by a letter which, owing to the latter's having changed his address, did not reach him before the mortgage fell due and was paid by him to the bank, which failed without accounting for the proceeds, and before the mortgagee knew of the payment, the mortgagee was not estopped to deny the bank's authority to receive the money by his mere delay in bringing suit to foreclose the mortgage. *Bloomer v. Dau*, 522.
2. The fact that a person in possession of land, claiming to be the owner, applied to the government to have the same surveyed and offered for sale, will not estop him from disputing the title of a purchaser at such sale, where he notified such purchaser, before the sale, that he was the owner and would contest the sale. *Church v. Case*, 554.
3. Where a husband signed for his wife a contract whereby it was stipulated that a tenant of land purchased by the wife, of which she desired possession, should be allowed, if he vacated the premises, to re-enter and harvest wheat sowed by him, the wife to have a fourth of the crop so harvested, and she, after accepting rents paid under the contract, and taking possession pursuant to its terms, attempted to repudiate the authority of her husband to sign the contract, and denied the tenant's right to the wheat, and drew it into her own barns, the tenant was authorized in bringing replevin for the same without any previous demand. *Payn v. Gidley*, 605.

See FIRE INSURANCE (1, 8); GUARDIAN AND WARD; MUTUAL BENEFIT ASSOCIATIONS (3); PRINCIPAL AND AGENT (1, 3); STATUTE OF LIMITATIONS (3).

EVIDENCE.

1. In proving the contents of a lost instrument, it is sufficient to prove its substance. *Holmes v. Deppert*, 275.
2. In proving the contents of a lost deed, witnesses must give the words or the substance of the words; they cannot be asked the "sense" of the deed. *Id.*
3. In an action to recover for injuries to a vessel, it was proper, on the question of damages, to show her value before and after the injury; her owner, who had owned other vessels also, being competent to express an opinion as to her original value; but the speculations of persons who had not examined her, as to whether it would be possible to tell the extent of her injuries, were properly excluded. *Michaud v. Grace Harbor Lumber Co.*, 305.
4. Under a claim that plaintiff's contract to pay a certain amount for sawing lumber was made under duress, he should not be allowed to testify that he could have had it sawed for a certain less amount, there being no evidence tending to show legal duress. *Foley v. Comstock*, 349.

EVIDENCE—Continued.

5. On the trial of an engineer for manslaughter in leaving steam-boilers unattended until the high pressure produced an explosion causing death, where respondent denied that his absenting himself on the occasion in question was negligent, it was error to admit proof of other occasions when he had negligently left the boilers unattended, since negligence could not be inferred from his conduct on prior occasions, and the case was not one for characterizing the intent by such proof. *People v. Thompson*, 412.
6. It was proper, however, as bearing upon the question of respondent's recklessness on the occasion in question, to show that he had been warned that danger would follow his absence from the boiler-room. *Id.*
7. On the trial of an engineer for manslaughter in leaving unattended steam-boilers, under which oil was used for fuel, until the high pressure produced an explosion causing death, it was error to admit evidence of comparisons between the use of coal and oil for generating steam, since a showing of how quickly steam may be raised with coal affords no light as to one's duty in attending boilers fired with oil. *Id.*
8. Upon such prosecution, however, where an expert had given his opinion as to the cause of the explosion, it afforded no ground for excluding his testimony, in support of the opinion, as to the results of experiments made by him to ascertain within what time a given pressure of steam could be raised in a boiler by the use of oil as fuel, that the conditions under which the experiments were made were not identical with those existing with respect to the exploded boiler. *Id.* 413.
9. Where, upon the trial of a public officer for the embezzlement of public funds, one of respondent's bondsmen, as a witness for the people, had testified to admissions made to him by respondent, and to payments made by the bondsmen, respondent should have been allowed to show, on cross-examination of the witness, the entire conversation with him, and the entire transaction about the payments. *People v. Warren*, 505.
10. A contract of sale as evidenced by unambiguous writings cannot be modified by parol proof of a warranty. *Hallett v. Gordon*, 567.
11. In an action for rent, where the amount was in dispute, it was error to admit evidence as to what the tenant of adjoining premises, also owned by plaintiff, paid him for their rental. *Stevens v. Beardsley*, 671.
12. It was proper, however, where defendant alleged, and plaintiff denied, an agreement that he should occupy at a reduced rental, to show, as bearing upon the probabilities of the truthfulness of the parties, that rents in the locality had depreciated during the period of defendant's occupancy. *Id.*

See CONFLICT OF LAWS; CONSIDERATION (3); CONTRACTS (2, 5); CORPORATIONS (1); COUNTY TREASURERS; CRIMINAL LAW (3, 4, 8-10); CUSTOM; DAMAGES (4, 5); GRAND JURY (3); HOMICIDE; PLEADING (1, 3); TRIAL (2, 10, 12, 15, 18, 19, 21); WITNESSES.

EXCESSIVE DAMAGES—See DAMAGES (6).

EXECUTION.

3 Comp. Laws 1897, § 9224, providing that the lien of a levy of execution shall, after the filing of notice with the register of deeds, be valid against "prior grantees" of whose claims the execution creditor had no notice, does not enable an execution creditor to obtain by his levy superior rights in land the title to which was taken by the debtor in his own name without authority from the real purchaser, as whose agent he was acting, even though the owner delays until after the levy the recording of a deed from the agent to himself, which, upon learning the facts, he caused to be executed, since, independent of his title as grantee under such deed, he has an enforceable title by virtue of 3 Comp. Laws 1897, § 8837, which provides that a trust shall result in favor of the person furnishing the consideration for a deed when the alienee therein takes title in himself without the knowledge or consent of such person. *Uhl v. Weiden*, 638.

See CORPORATIONS (8); DEEDS (1); FRAUDULENT CONVEYANCES; HOMESTEAD (4).

EXECUTORS AND ADMINISTRATORS—See ESTATES OF DECEDENTS (2, 3); PARTNERSHIP (1); WILLS.

EXPERIMENTS—See EVIDENCE (8).

EXPERT TESTIMONY—See CRIMINAL LAW (9); EVIDENCE (3, 8)

EXPLOSIONS—See CRIMINAL LAW (9-11); EVIDENCE (5-8).

EXTENSION OF TIME—See CONSIDERATION (3, 4).

FAIR GROUNDS—See TOWNSHIPS.

FALSE PRETENSES.

1. An information for obtaining money by false pretenses shows a natural connection between the false pretenses and the obtaining of the money, where it alleges that respondent fraudulently obtained orders for greater amounts than due, and then presented the orders and obtained the money thereon, though the orders were payable to third persons, and it is not averred how they came to respondent. *People v. Luttmoser*, 562.
2. The gist of the offense charged by an information being the obtaining of money by the presentation of false orders, and the averment as to obtaining the money being single, there is no duplicity because of averments as to false pretenses by which the persons were induced to sign the several orders. *Id.*
3. Upon the prosecution of a member of a township board for obtaining money from the township upon orders which he induced his associates to sign for more than the amounts due, an instruction is not erroneous which permits a conviction if the jury should find that the fraudulent orders would not have been issued but for respondent's wrongful act, though they may also find that the other members of the board, in signing

FALSE PRETENSES—Continued.

the orders, acted to some extent upon a hasty examination of their own, and not altogether in reliance upon respondent. *Id.*

4. The presentation of orders for the payment of money by one who fraudulently procured them to be issued for more than the amounts due is a pretense, within the statute (3 Comp. Laws 1897, § 11575) prescribing a punishment for obtaining money by false pretenses. *Id.*

FARE, RATES OF—See RAILROADS (7).

FENCES.

1. On a bill to set aside the findings of fence viewers requiring complainant to contribute towards a partition fence on the north and east lines of her property, it appeared that a fence of some kind had been maintained on those lines for some time prior to the action of the fence viewers, but that the fences along the highways on her west and south lines had been taken down eight years before. *Held*, that complainant's land was an "inclosure," within the meaning of 1 Comp. Laws 1897, chap. 83, relating to the maintenance of partition fences between adjoining inclosures. *Scofield v. Haire*, 285.
2. One who is given no notice of a meeting of fence viewers to determine the amount he should pay towards the cost of a partition fence is not entitled for that reason to have the action proceedings, if otherwise regular, set aside, but is sufficiently protected if a new meeting is appointed to determine the amount to be paid by him, and he is given an opportunity to be present at that meeting. *Id.*

FIRE INSURANCE.

1. The provisions of a fire-insurance policy declaring it void if the subject of insurance be a manufacturing establishment, and be operated later than 10 o'clock at night, and denying the authority of agents to waive any condition of the policy except by written agreement duly indorsed, will not avail the insurer as a defense, where the subject of insurance, a factory, is destroyed by fire while being operated after 10 o'clock, if the insurer's agent who solicited the insurance and delivered the policy understood that the factory was in operation day and night; the insurer, under such circumstances, being deemed to have issued the policy with knowledge of all the facts, and to be therefore estopped from setting up the same as a defense. *Improved-Match Co. v. Michigan Mut. Fire Ins. Co.*, 256.
2. A judgment against an insurance company for the amount of a policy will not be reversed because the policy covered only the company's proportionate share of concurrent insurance, in different amounts, upon the several classes of property connected with a manufacturing plant, and the plaintiff failed to show the loss on each of the several classes, if it appears from the undisputed evidence that the loss was total, and was only partially covered by insurance; especially if de-

FIRE INSURANCE—Continued.

defendant's attorney had ample opportunity below to elicit the information from plaintiff's witnesses, and made no effort to do so. *Id.* 257.

3. Plaintiff applied to L., an insurance agent, for insurance upon her property, and was informed by L. that the companies which he represented would not accept the risk, but that he would try to place it elsewhere. The local agents of several companies were consulted by L., and policies were successively issued, all of which were ordered canceled when reported to the companies concerned, among which companies was defendant. After a fire, plaintiff sought to hold defendant liable, upon the ground that L. had no authority to accept notice of cancellation and surrender the policy. *Held*, that plaintiff could not be sustained in the inconsistent contentions that L. had authority to surrender prior policies, which, unless canceled, would render subsequent insurance void, and yet, under precisely the same state of facts, had no authority to surrender the policy in suit. *Kooistra v. Rockford Ins. Co.*, 626.

See **INSURANCE**.

FORBEARANCE TO SUE—See CONSIDERATION (3, 4).

FORECLOSURE—See MORTGAGES (2, 3, 6, 7); **PARTITION**; **PRINCIPAL AND AGENT** (2, 3).

FOREIGN JUDGMENTS—See APPEAL AND ERROR (4); **CONFLICT OF LAWS**.

FORGERY.

1. An information for uttering a forged note which gives a signature thereto in English, while the note was signed in German, should set out that the name was written in German, and give its English equivalent. *People v. Bennett*, 281.
2. An instrument promising to pay a stated sum, with interest, at a specified date, together with "10 per cent. attorney's fees for collecting same, to be included in any judgment on this note, without relief from valuation or appraisal laws," while not a promissory note, is subject to forgery at the common law; and an information for uttering such a forged instrument is not invalid because it is misnamed therein as a "promissory note." *Id.*

See **AMENDMENTS**; **CRIMINAL LAW** (3).

FRANCHISES — See MUNICIPAL CORPORATIONS (3, 4); **STREET RAILWAYS** (2-7).

FRAUD — See ASSUMPSIT (3); **CORPORATIONS** (4, 6, 7); **EQUITY JURISDICTION** (2, 3).

FRAUDULENT CONVEYANCES.

1. Where semi-annual dividends upon stock belonging to a married woman, but purchased in part with her husband's money,

FRAUDULENT CONVEYANCES—Continued

were, for a period of 12 years, turned over to the husband and used by him, without any understanding that they constituted a loan from the wife that he was expected to repay, a conveyance of property to the wife in repayment of the dividends, made after the circumstances of the parties have become reduced from affluence to insolvency, will not be upheld as against an execution creditor of the husband. *Preston Nat. Bank v. Leonard*, 381.

2. A decree subjecting to an execution against a married man property conveyed by him to his wife, to the extent that the value of the property exceeded, in the opinion of the circuit judge, the consideration furnished by the wife, was reversed; the court being of opinion that the finding on which the decree was based, that the consideration was grossly inadequate, was not justified by the evidence. *First Nat. Bank of Lake Linden v. Condon*, 457.

FRIGHT, INJURY FROM—See ACTIONS.

FRUIT TREES, CONTRACTS FOR—See DAMAGES (3, 4).

GARNISHMENT.

- P., the owner of a lumber contract worth \$1,000 and upwards, assigned the same, for a consideration of \$10, to B., who took it subject to the claim of M. After being served with garnishee process, B. assigned the contract to M., who repaid the \$10, and credited the amount realized from the lumber upon his claim against P. Held, that B. was improperly held liable as garnishee of P. *Merchants' Nat. Bank of Toledo v. Barrett*, 650.

GRAND JURY.

1. Upon a plea in abatement to an indictment, only those objections going to the competency of jurors can be raised which, under 3 Comp. Laws 1897, §§ 11881, 11882, would have been good ground for challenge, viz., that a juror was prosecutor or complainant. *People v. Thompson*, 411.
2. Section 23 of the Wayne county jury act (Act No. 95, Pub. Acts 1887), which provides for drawing the names of 23 persons to serve as grand jurors, was not designed to modify the general law (3 Comp. Laws 1897, § 11879), under which "not less than 16 persons" are required "to be sworn" on any grand jury; therefore, an indictment found in Wayne county is not invalid because the jury returning it was composed of only 21 persons. *Id.*
3. Since public policy forbids a prosecuting officer to divulge his knowledge of what testimony was taken before a grand jury as the basis for an indictment, the courts will refuse to consider a stipulation purporting to set out such testimony, and signed by the prosecuting attorney, though presented for the purpose of expediting the hearing on a plea in abatement. *Id.*

GROSS NEGLIGENCE—See RAILROADS (2).

GROWING CROPS—See INJUNCTION (2).

GUARDIAN AND WARD.

A proceeding by an adjudged lunatic in probate court, under 3 Comp. Laws 1897, § 8724, which provides that the guardian of any insane person may be discharged when it shall appear, on application of the ward or otherwise, that such guardianship is "no longer" necessary, will estop the ward from subsequently going into equity and attacking the validity of the original appointment. *Cornett v. Cornett*, 685.

HIGHWAYS.

Where land has been occupied and held adversely for 18 years by one claiming to be the owner, it is not necessary, in order to lay out a highway on such land, to serve the statutory notice on others claiming an interest therein. *Nedow v. Porter*, 456.

See ADVERSE POSSESSION (3); CONTRIBUTORY NEGLIGENCE (1, 2); MUNICIPAL CORPORATIONS (1-4, 16, 17, 19); STREET RAILWAYS (5).

HOMESTEAD.

1. Complainant, at the solicitation of his parents, agreed to remain at home and provide for them, in consideration of which his father promised that whatever he should die possessed of should go to the son. Subsequently the parents joined in a deed of the homestead, to be held for the son in escrow, and delivered to him at his father's death. After the death of the father, complainant discovered a clause in the deed, of which he claimed to have been ignorant theretofore, declaring that title should not pass to him until the mother's death. Subsequently, a controversy having arisen over the possession of the premises, he filed a bill against his mother for specific performance. *Held*, that, inasmuch as the deed itself expressly reserved the title until the mother's death, there was no alienation of the homestead, signed by her, upon which complainant's right thereto could be predicated as against her, and that any parol agreement or understanding was void under article 16, § 2, of the Constitution. *Francis v. Francis*, 10.
2. A writing signed by a contract purchaser of land and by his wife, directing the vendor to make the deed to a third person, is effectual to cut off the wife's homestead rights, under 3 Comp. Laws 1897, § 10363, which provides that a mortgage or "other alienation" of the homestead, to be valid, must bear the signature of the wife. *Stephens v. Leonard*, 125.
3. A tenant in common may have the benefit of a homestead in the lands held in common. *Lawrence v. Morse*, 269.
4. Occupancy sufficient to support a claim of homestead as against an execution creditor is established by the claimant's moving household goods to the premises as soon as he becomes vested with the title, and by his sleeping there nights, and taking his breakfasts and his suppers there, although his wife and family were living on other premises owned by her at the time of the levy. *Id.*

See MORTGAGES (2).

HOMICIDE.

Where a physician, who visited deceased 11 hours before her death, found her suffering from the effects of an abortion, and informed her that she was a very sick girl, and that he could promise her nothing in the way of recovery, but would do all that could be done under the circumstances, and deceased, appearing to realize her condition, told the physician, in answer to a question as to the cause of her sickness, that respondent produced the abortion by means of an instrument, the statement implicating respondent was properly admitted, on a prosecution for manslaughter, as a dying declaration. *People v. Lonsdale*, 388.

See CRIMINAL LAW (8-11); EVIDENCE (5-8).

HOTELS—See INTOXICATING LIQUORS.

HUSBAND AND WIFE — See DEEDS (1); DIVORCE; DOWER; ESTOPPEL (3); FRAUDULENT CONVEYANCES; HOMESTEAD (1, 2); MARRIAGE; PARTNERSHIP (3).

ICE, INJURY UPON—See CONTRIBUTORY NEGLIGENCE (1); MUNICIPAL CORPORATIONS (5).

IMPEACHMENT OF WITNESS—See TRIAL (13).

INCLOSURE, DEFINED—See FENCES (1).

INDICTMENT—See GRAND JURY.

INFANTS—See CONFLICT OF LAWS; RAPE.

INJUNCTION.

1. Although injunction is usually refused where defendant answers fully, denying all the allegations of the bill, the granting it, even under such circumstances, is within the discretion of the court. *Mactavish v. Kent Circuit Judge*, 242.
2. A complainant who, four days before he was entitled to the possession of land, obtained an injunction restraining a tenant from cutting certain immature crops, which the latter had a clear right to harvest at any time within the four days, is not in position to assert in equity his right to the crops after the four days have expired. *Piper v. Piper*, 662.

See EQUITY JURISDICTION; MANDAMUS (3, 4).

INSANE PERSONS—See GUARDIAN AND WARD.

INSTRUCTIONS TO JURY—See CRIMINAL LAW (5, 11, 12); FALSE PRETENSES (3); STREET RAILWAYS (1); TRIAL (1, 3, 4, 10, 12, 14-16, 18, 20).

INSURANCE.

1. One who, after being informed by the general manager of an insurance company that the company would issue policies for him on acceptable risks, and would allow him commissions, placed several policies for the company, and col-

INSURANCE—Continued.

lected and forwarded the premiums, will be held to have acted in a particular transaction, in which he solicited insurance for the company, as its agent, and not as the agent of the insured. *Improved-Match Co. v. Michigan Mut. Fire Ins. Co.*, 256.

2. Where an insurance company is informed by the insured of a loss, and immediately answers that the policy has been canceled on account of violations of conditions in the policy, no proofs of loss are necessary. *Id.* 257.

See EQUITY JURISDICTION (2, 3); FIRE INSURANCE; LIFE INSURANCE; MUTUAL BENEFIT ASSOCIATIONS.

INTENT—See CRIMINAL LAW (8); EMBEZZLEMENT (1); EVIDENCE (5).

INTEREST.

An agreement to allow interest on payments on a note until fully paid means only that interest shall cease from date of payment. *Foley v. Comstock*, 349.

See CONSIDERATION (4); CONTRACTS (6); PRINCIPAL AND AGENT (5); TRIAL (12); VENDOR AND PURCHASER.

INTOXICATING LIQUORS.

A room in a hotel, set apart for the sale of intoxicating liquors at retail, is a saloon, within 1 Comp. Laws 1897, § 2769, subd. 7, authorizing villages to suppress saloons for the sale of liquors. *Rattenbury v. Common Council of Village of Northville*, 158.

ISLANDS—See PUBLIC LANDS.

JOINT DEFENDANTS—See APPEAL AND ERROR (5); JUDGMENTS

JOINT RESOLUTIONS—See CONSTITUTIONAL LAW (1, 2).

JUDGMENTS.

Where, after a judgment against joint defendants, one defendant severs for the purpose of prosecuting a writ of error, and, upon a second trial, judgment again passes for the plaintiff, with no discontinuance as to the nonappealing defendant, the new judgment must be entered against both. *McPherson v. Bristol*, 354.

See APPEAL AND ERROR (4, 5); CONFLICT OF LAWS; COSTS; REPLEVIN (1); RES JUDICATA.

JUDICIAL NOTICE—See RAILROADS (4).

JURISDICTION — See BANKRUPTCY (4); EQUITY JURISDICTION; TITLE TO LANDS; WILLS (3).

JURY—See GRAND JURY.

JUSTICES OF THE PEACE.

Whether a justice of the peace is authorized to issue an *alias* writ of replevin for the sole purpose of remedying a defect in the service,—*quære*. *Chapelle v. Webster*, 482.

LACHES.

Where G. made a settlement with N., and gave him a note for the amount due him on the basis that a certain mortgage belonged to N., he cannot, 30 years afterwards, during which time there has been another settlement on the same basis, and N. has died, claim that the mortgage belonged to him, and that he should have had credit therefor on, the note. *Northrup v. Gray*, 700.

See ESTOPPEL (1); PRINCIPAL AND AGENT (4).

LAKES—See PUBLIC LANDS.

LAND CONTRACTS—See DOWER; HOMESTEAD (2); VENDOR AND PURCHASER.

LANDLORD AND TENANT.

1. Where a lessee gave 30 days' notice of intention to quit, and the parties then, without waiving any other rights or admitting any liability, agreed that, if the lessor's attorney should procure a satisfactory tenant, no claim would be made on the lessee for rent after the commencement of such latter tenant's term, and at the end of the 30 days the lessee took the key to the lessor, who told the lessee to leave it with the lessor's attorney, no intention of the lessor to surrender his rights under the lease by acceptance of the key is shown. *Steketee v. Pratt*, 80.
2. The tenancy is not at will, but from year to year, or at least for a year, where entry was under a parol agreement for a lease for three years, at a specified annual rental, payable monthly in advance. *Id.*
3. That a lessee from month to month continues to occupy the premises for more than one month after the landlord's refusal or neglect to make promised repairs does not make his holding a new one, independent of the terms of the original tenancy, so as to relieve the landlord from liability for damages thereafter arising from the defective condition of the premises. *Mason v. Howes*, 329.
4. A landlord who agrees to make necessary repairs for the tenant, and afterwards knowingly leaves the plastering in a defective condition, is liable for damages to her stock of goods caused by fire from a lamp upset by falling plaster. *Id.* 330.

See CONTRIBUTORY NEGLIGENCE (7); EVIDENCE (11, 12).

LIBEL AND SLANDER.

1. A published letter charging that plaintiff got up a raffle for the benefit of the writer without his consent; appointed a committee of a fraternal organization to manage it; said he had received no money from it; that some of the members of

LIBEL AND SLANDER—Continued.

the organization had purchased tickets; that the intended beneficiary received nothing from it; and that the facts were published so that the members might get their money back,— is not libelous, as charging or imputing that plaintiff was guilty of falsehood, deceit, fraud, or misconduct as a member of said organization, or that he had obtained money by false pretenses, and had embezzled or misappropriated it. *Brown v. Boynton*, 251.

2. A publication, made pending an election, imputing to plaintiff the remark that there was not one of a certain class of voters in his county who could not be bought for a two-dollar bill, and stating that he was one of the ring's chief heelers, and that such remark indicated how the ring intended to carry the fall election, is libelous *per se*, as holding plaintiff up to public hatred and contempt, and charging him with the purpose of committing bribery. *Field v. Magee*, 556.
3. Defendant in an action for libel cannot complain that the court failed to instruct the jury to specify in their verdict separately, as required by 3 Comp. Laws 1897, § 10424, the amount awarded for damages to feelings and the amount awarded for other damages, where no request was made for such instruction. *Id.* 557.

LICENSE—See **ADVERSE POSSESSION** (2); **ESTATES OF DECEDENTS** (3).

LICENSE FEES—See **MUNICIPAL CORPORATIONS** (18).

LIENS—See **CORPORATIONS** (6, 9); **EXECUTION**.

LIFE INSURANCE.

The assignment, with the consent of the insurance company, by insured, of a policy on his life, payable to his executors, administrators, or assigns, to one having no insurable interest, who thereafter paid the premiums on said policy, entitled the assignee to the proceeds of the policy on the death of the insured, there being no restrictions on insured's right to assign it in the policy or the by-laws of the company. *Prudential Ins. Co. v. Liersch*, 436.

LIMITATION OF ACTIONS—See **STATUTE OF LIMITATIONS**.

LIQUOR TRAFFIC—See **INTOXICATING LIQUORS**.

LOST INSTRUMENTS—See **EVIDENCE** (1, 2); **WITNESSES** (2).

MALICIOUS PROSECUTION.

1. Proof that defendant in an action for malicious prosecution of a writ of attachment acted upon the advice of counsel, given after a full and fair statement of all the material facts known to defendant, establishes probable cause, even though the advice given was not warranted by the facts disclosed to the attorney. *Kompass v. Light*, 86.
2. The question of probable cause for suing out a writ of attach-

MALICIOUS PROSECUTION—Continued.

ment is one of law for the court, where the facts are undisputed. *Id.*

3. On a payment of rent, a controversy arose between the tenant and defendant, the landlord. The tenant demanded a return of rent he had just paid, or a receipt. Defendant started to leave the premises, when the tenant assaulted him, and plaintiff, coming to the tenant's assistance, to prevent defendant from getting into the street, pushed him back. Defendant sued them by *capias* for the assault, and judgment was rendered of no cause of action. Plaintiff then sued for malicious prosecution. *Held*, that the court should have charged that defendant had probable cause for instituting the suit. *Davis v. McLaulin*, 393.

MANDAMUS.

1. *Mandamus* will not lie to compel a circuit judge to set aside a judgment reversing on *certiorari* an order of the probate court, upon the ground that the respondent had no jurisdiction to hear the matter on *certiorari*, since his action in assuming jurisdiction is reviewable on writ of error. *Reed v. St. Clair Circuit Judge*, 153.
2. The fact that an order to show cause was issued on an application for *mandamus* is not conclusive that *mandamus* is the proper remedy. *Id.*
3. On *mandamus* to compel the dissolution of an injunction restraining an action at law, it is unimportant that the injunction bill failed to allege the state of the pleadings in the action sought to be enjoined; counsel having had opportunity to bring the subject to the attention of the court on his motion to dissolve the injunction. *Mactavish v. Kent Circuit Judge*, 243.
4. Nor is it important that the injunction bill contained no allegation that the legal remedy was inadequate, the point being one properly raised by demurrer. *Id.*
5. *Mandamus* will lie to compel a circuit judge to vacate an erroneous order overruling a plea in abatement. *Carpenter v. St. Clair Circuit Judge*, 323.
6. *Mandamus* will not lie to compel a circuit judge to vacate an order quashing, with costs, a writ of replevin, since the order is final, and reviewable on error. *Dages v. Sanilac Circuit Judge*, 490.
7. When an office is already filled by an actual incumbent, exercising the functions of the office *de facto* and under color of right, *mandamus* will not lie to compel him to turn over the books and papers pertaining to the office to one who disputes his title; *quo warranto* being the proper remedy. *Ashwell v. Bullock*, 620.
8. The title of the incumbent of an office who is *prima facie* entitled thereto, and who is actually exercising its functions, will not be tried in *mandamus* proceedings instituted by a contesting claimant. *Pipper v. Wayne Circuit Judges*, 688.

See MORTGAGES (6); TAXATION (10).

MANSLAUGHTER—See **CRIMINAL LAW** (8-11); **EVIDENCE** (5-8);
HOMICIDE.

MARRIAGE.

1. Defendant in divorce proceedings, who denies the marriage, waives the right to have the issue submitted to a jury, under the provisions of 1 Comp. Laws 1897, § 444, where he makes no request for its submission. *Flanagan v. Flanagan*, 386.
2. Where a marriage ceremony is performed between two persons, who afterwards cohabit for eight years, until the woman discovers that the man, at the time of the ceremony, was undivorced from a former wife, and the parties agree, upon a divorce being obtained, that they will treat the ceremony as binding, and they continue for three years more to live together, they are properly held, in divorce proceedings, to be husband and wife. *Id.*

MASTER AND SERVANT.

1. A brakeman who, while riding on the side ladder of a freight car, upon the main track, was injured by coming in contact with a fish-chute erected beside the track, at a point near a station, but outside of the yard where trains were made up, is not precluded from a recovery, as a matter of law, on the ground that he assumed the risk of such injury, where, although the chute was in plain view, he was unacquainted with the surroundings; though the rule would be otherwise had the accident occurred by reason of such a structure abutting upon a side track. *Phelps v. Chicago, etc., R. Co.*, 171.
2. It cannot be said, as a matter of law, that a railroad brakeman assumed the risk of injury from coming in contact with a telegraph pole negligently placed so near to a side track as to prevent him, when riding on the side ladder of a car, from passing it in safety, where, though it appears that he had walked by the pole and had ridden by it on the tops of cars several times previous to the accident, it further appears that the other poles along the line were not so placed, and it is not shown that he had actual knowledge of the dangerous proximity of the pole in question. *Potter v. Detroit, etc., R. Co.*, 179.
3. The ends of the cross planking of a tramway, on which plaintiff was employed as a driver, extended beyond the stringers from 8 to 14 inches. Many of them became broken, being of a poor quality of pine, and when so broken were never repaired. There was barely room for a person to stand upon them when a loaded car was on the track. The space between the rails was doubly planked, and was maintained in a safe condition. Plaintiff, while lifting a derailed car, threw his weight on the end of one of the planks, and it broke and caused his injury. He had had five years' experience about the tramway, and knew that the car could be replaced without his standing outside the stringer. *Held*, that he assumed the risk. *Davey v. Hall & Munson Co.*, 206.
4. An employé of a railroad company, who, after dark, assisted in moving a detached way-car along a siding by pushing

MASTER AND SERVANT—Continued.

against a hand-rail on the front platform while he walked beside the car, assumed the risk of being injured by running against a coal-bin built close to the siding. *Pahlan v. Detroit, etc., R. Co.*, 233.

5. A factory employé who tripped and fell upon a small circular saw, the edge of which extended about 2 inches above the surface of an equalizing machine, in which it was set at a place 18 inches from the front, 26 inches from the rear, and 8 inches from the edge of the table of such machine, cannot recover from his employer for his injuries, where it appears that he was acquainted with the situation, and had been warned of, and appreciated, the danger of coming in contact with the saw; the risk being assumed by him as incident to his employment. *Journeaux v. E. H. Stafford Co.*, 396.
6. A manufacturer is under no legal duty to provide guards or screens for all machinery the contact with which would be dangerous, where employes are warned of the danger, and are given room to carry on with reasonable safety the work they are expected to perform. *Id.*
7. Where a mining company had provided a suitable and safe platform for its employes to stand on when engaged in barring down ore, which would become clogged in the chutes constructed to discharge the ore into ore cars, an experienced workman who, without being authorized or directed to do so, climbed into one of the cars for the purpose of performing that duty, was guilty of negligence, and assumed the risk of being injured by contact with a trolley wire overhead. *Lepala v. Cleveland Iron-Mining Co.*, 633.

See CONTRIBUTORY NEGLIGENCE (5); RAILROADS (3, 4).

MINES AND MINING—See MASTER AND SERVANT (7).

MISJOINDER—See PARTIES (2, 4).

MORTGAGES.

1. A deed from a corporation, absolute on its face, but given to secure advances made by a director, is a mortgage, and the corporation may convey the property in payment of its debts, subject to such mortgage, if valid. *Moore v. Universal Elevator Co.*, 48.
2. Where a mortgage of a homestead and other property, given to secure the payment of eight notes of equal amount, contains a provision that, on payment of the three notes first maturing, the homestead shall be released, the property other than the homestead is alone liable, in case of payment of such three notes, for the balance of the debt; but, if such notes are not paid, the mortgagee may claim the whole as security, and will not be required to release the homestead in case enough should be realized from a sale of the other property to pay the three notes in question. *Stephens v. Leonard*, 125.
3. Where the owner of two purchase-money mortgages discharged them, and accepted in their stead a new mortgage, which, while it purported to be signed by the mortgagor's

MORTGAGES—Continued.

- wife, was in fact forged as to her, and such mortgage was foreclosed and the premises bid in by the mortgagee's administrator in the belief that the wife's claim of forgery was merely a pretense to secure dower and homestead rights, such administrator is entitled, upon its subsequently appearing that the wife's claim is true, to maintain a bill in equity to revive the earlier and genuine mortgages, the same as if the fraudulent mortgage had not been foreclosed. *Linn v. Linn*, 130.
4. The fact that a note and mortgage are made payable at a certain bank does not constitute the bank an agent to collect the same. *Bloomer v. Dau*, 522.
 5. A mortgagor who pays his mortgage to a banker who has been the mortgagee's general agent, knowing that the banker no longer has the note and mortgage in his possession, but relying, without inquiry as to the continuance of the agency, upon the banker's statement that he will secure the proper discharge, does so at his own risk. *Id.*
 6. *Mandamus* was granted requiring the circuit judge to postpone a sale of property under a decree of foreclosure until the expiration of a year from the time of the appearance of certain of the defendants not served with process, it appearing that, owing to the pendency of certain suits affecting the property, it could not be sold to advantage at the earlier date fixed by the court. *Roberts v. Kalamazoo Circuit Judge*, 560.
 7. One against whom a decree for a deficiency passes in foreclosure proceedings, the officer having made return that he was served with process, may on bill of review, when it appears that he was not so served, be given an opportunity to make defense; but the decree against him will not be disturbed on the ground merely that he had no opportunity to attend the sale and see that the property sold for its fair value, if it is not made to appear in fact that the property was sacrificed and that a resale is desired. *Dickerson v. Corning*, 631.
 8. Though a deed excepting from the grant "a part assigned to a widow as her dower interest" be construed as excepting the fee of the part assigned, and not merely the widow's life estate, if the grantee mortgages the entire land "except the life estate of the widow," title subsequently acquired by him from the remainderman will inure to the mortgagee, under covenants of warranty contained in the mortgage. *Caple v. Switzer*, 636.
- See CHATTEL MORTGAGES; CONTRACTS (6); CORPORATIONS (1, 6, 8); ESTATES OF DECEDENTS (2, 3); ESTOPPEL (1); PRINCIPAL AND AGENT (2, 3).

MUNICIPAL CORPORATIONS.

1. Whether a sidewalk which contained a plank broken in such a way as to make a depression of from four to six inches in width, fifteen to eighteen inches in length, and two to three

MUNICIPAL CORPORATIONS—Continued.

inches in depth, which, when stepped upon, sunk to the ground, a distance of from three to four inches, was reasonably safe for travel, is a question for the jury. *Urtel v. City of Flint*, 65.

2. A city is chargeable with notice of a defect in a sidewalk which had existed for several months, and could be seen for two rods. *Id.*
3. The fact that individuals, after obtaining a contract from a city to light by electricity certain of the public streets, are permitted, without protest, to light a few private business houses along the line of such streets, will not entitle them, when, at the expiration of their contract, they are directed by the city to remove their poles and fixtures, to set up rights in the streets based upon the private lighting. *Horner v. City of Eaton Rapids*, 117.
4. A charter provision giving to the common council of a city the right to provide for the public lighting of the streets confers no power on the council to grant a perpetual easement in the streets for the maintenance of poles and wires for use in private lighting. *Id.*
5. Where a board of education erects a school building in such manner that ice and snow must inevitably slide from the roof onto plaintiff's premises, there being no sufficient barrier to prevent, and fails, after notice, to remedy the defect, it may be held liable to him for injuries sustained in falling upon ice so precipitated, the trespass being the proximate cause of the injury. *Ferris v. Board of Education of Detroit*, 315.
6. The city of Detroit being established by Act No. 233, Laws of 1869, for educational purposes, as a single school district under the control of a board of education, and such school district being an entity distinct from the municipality, except as brought into certain relations with it under special acts, the provision of the general charter (Act No. 463, Local Acts 1895, § 46) requiring notice of claims against the city, or any of its boards or commissions, for negligent injuries, to be given to the city counselor within three months from the time the injury occurs, has no application where injury is caused by the negligence of the board of education. *Id.*
7. After the common council of a city had voted the entire amount of taxes which, under the charter, it might lawfully vote in a given year, it entered into a contract for the installation of an engine in the city electric-lighting plant, by the terms of which the city agreed to pay \$2,650 within 30 days after the engine should be accepted. After the engine had been accepted, and \$650 paid on the contract, the city refused to pay the balance, claiming that the contract was *ultra vires*, because in excess of the amount of indebtedness which the council was authorized to incur. The tax levy for the year included an item of \$1,400 for electric-lighting purposes. *Held*, that, in order to maintain the defense, it was incumbent upon the city to show that, at the date of the contract, there were not sufficient funds on hand, either in the lighting

MUNICIPAL CORPORATIONS—Continued.

- fund or the general fund, or both, which, added to the \$1,400 to be raised, would have enabled the city to meet the obligations imposed by the contract. *Arbuckle-Ryan Co. v. City of Grand Ledge*, 491.
8. A city charter provided that, whenever the common council should order a public work, the board of public works should estimate the cost, and might cause surveys, plans, and specifications to be made, and report the same to the council, with such other recommendations as they might deem advisable. A sewer contract, entered into by authority of the council, provided that in case the amount of excavation or material should vary from the specifications, plans, or estimates, which were referred to in, and made a part of, the contract, the compensation to be paid the contractor should be increased or diminished *pro rata*. *Held*, that the estimates reported by the board were meant, and not those of the city surveyor, upon whose survey and estimate the report of the board was apparently based; and that the surveyor's estimate was no part of the contract. *Fox v. City of Bay City*, 499.
 9. Where the common council of a village considers and allows a claim, though not accompanied by an affidavit or by a certificate of an officer of the corporation, as provided by 1 Comp. Laws 1897, § 2754, the formalities will be deemed waived, and their absence, therefore, will not justify the village president in refusing to sign an order for the payment of the claim. *Kriseler v. Le Valley*, 576.
 10. Under 1 Comp. Laws 1897, § 2700, providing that the president of a village shall appoint, by and with the consent of the council, such officers as shall be provided for by ordinance or resolution, an ordinance providing for the appointment of a deputy marshal is sufficient to authorize the appointment of an officer designated by the president as "night watchman and deputy marshal," though his duties are prescribed as commencing at 6:30 nightly, and continuing until 5:30 the following morning. *Id.*
 11. Under 1 Comp. Laws 1897, § 2710, providing that a village council may declare an office vacant for failure to give a bond, an office is not vacated by such failure until action by the council. *Id.* 577.
 12. Under 1 Comp. Laws 1897, § 2729, which provides that the president of a village may remove any officer "appointed by him" when he shall deem it for the public interest to do so, he has authority, when in his judgment the public interest requires it, to remove officers to whose appointment the consent of the council is required. *Id.*
 13. Under 1 Comp. Laws 1897, § 2729, authorizing a village president to remove officers appointed by him, a removal is not effective until the officer has been notified thereof. *Id.*
 14. A notice to a village officer, signed only by the village clerk, informing him that, at a meeting of the council, all appointive officers were discharged, is not notice of any action by the president, in whom by 1 Comp. Laws 1897, § 2729,

MUNICIPAL CORPORATIONS—Continued.

- authority to remove from office is vested, and it is therefore insufficient to relieve such officer from duty. *Id.*
15. A charter provision requiring persons claiming damages from a city for personal injuries to furnish the common council with the names of witnesses within a stated time after the injury occurred imposes no duty upon the claimant to produce such witnesses before the council. *Monje v. City of Grand Rapids*, 645.
 16. In an action against a city for injuries sustained by falling into an unguarded excavation at night when attempting to board a street car, the city cannot escape liability upon the ground that the company's negligence in stopping the car so near the excavation was the proximate cause of the injury. *Id.*
 17. A city being, under its charter, responsible for constructing sewers and their connections, it is liable for injury to one falling into a trench for a sewer connection negligently left uncovered, though the work was done by a licensed plumber, who alone had notice of the defect. *Id.* 646.
 18. Under 1 Comp. Laws 1897, § 3107, subd. 11, authorizing cities of the fourth class to regulate by ordinance the licensing of peddlers, but conferring no discretion upon the city officers in the matter of fixing license fees, an ordinance which purports to prohibit the sale from house to house of a certain commodity without a license, but fails to fix the license fee, is invalid. *City of Mt. Clemens v. Sherbert*, 674.
 19. A paving contractor who, after completing the paving of a city street, was put to expense in remedying depressions therein, caused by the settling of the earth around water mains laid under the direction of the board of water commissioners before the paving was begun, cannot recover against the board, as the omitted duty to pack the earth in the excavation was at most a duty owing to the public, and not to the individual who might contract to pave the street. *Grant v. Board of Water Com'rs of Detroit*, 694.

See ADVERSE POSSESSION (3); CONSTITUTIONAL LAW (4-8); CONTRIBUTORY NEGLIGENCE (2); INTOXICATING LIQUORS; RAILROADS (1); STREET RAILWAYS (2-7); TOWNSHIPS (2).

MUTUAL BENEFIT ASSOCIATIONS.

1. Where there is a question as to the time within which assessments levied by a mutual benefit association must be paid to prevent a forfeiture, its articles of association will govern, instead of by-laws adopted by the board of directors. *Shelden v. Nat'l Masonic Acc. Ass'n*, 408.
2. Where the articles of a mutual benefit association require its members to pay assessments within a given time after having been "notified," to prevent a forfeiture of benefits, and provide that mailing a notice shall constitute such "notification," time does not begin to run against a member until he receives the notice, or ought to have received it in the ordinary course of the mails. *Id.*

MUTUAL BENEFIT ASSOCIATIONS—Continued.

3. A mutual benefit association cannot take advantage of a delay in furnishing proofs of loss, occasioned by a neglect of duty on the part of its secretary in supplying blanks for such proofs after a request for the same by the beneficiary. *Id.*
4. A by-law of a mutual benefit association, providing that any member receiving bodily injuries which alone shall "cause amputation of a limb (whole hand or foot)" shall be entitled to certain benefits, does not cover the case of an amputation of only a part of a foot, though the foot is rendered useless for the performance of its natural functions. *Fuller v. Locomotive Engineers' Mut. Life & Acc. Ins. Ass'n*, 548.

NEGATIVE TESTIMONY—See WITNESSES (3).

NEGLIGENCE.

1. Where it is not clear that a shipmaster's acquaintance with a dock, which he had used on prior occasions, was such that he must have known that the snubbing-post to which he tied up was not properly braced underneath, it was for the jury to say whether or not, in view of the dock-owner's directions to tie to the particular post, and his assurance that the dock was perfectly safe, he assumed the risk of injury to the vessel occasioned by the post's canting over in a storm and releasing the boat. *Michaud v. Grace Harbor Lumber Co.*, 805.
2. In mooring defendant's steamer, the mooring line caught on and displaced a timber on plaintiff's dock, causing a hoisting machine to fall. Action was brought to recover damages for the injury done the machine. There was evidence that, when the line had been fastened to a pile on the dock, the captain of the steamer gave the signal to go ahead, after having asked a man on the dock to throw the line over the timber. The line failed to clear the timber, and the headway on the steamer caused the support to be pulled out before the line could be thrown off. *Held*, that the question of negligence on the part of the captain of the steamer was for the jury. *Pittsburgh & Conneaut Dock Co. v. Detroit Transportation Co.*, 445.
3. It appearing that the timber supporting the machine was sufficiently fastened for the purpose for which it was intended, plaintiff could not be charged with contributory negligence in failing to fasten it so securely that it would withstand an unusual strain, such as that to which it was subjected through defendant's negligence. *Id.*

See BANKS AND BANKING (1); CONTRIBUTORY NEGLIGENCE; CORPORATIONS (3, 6); CRIMINAL LAW (9-11); EVIDENCE (5-8); MASTER AND SERVANT; MUNICIPAL CORPORATIONS (1, 2, 5, 6, 15-17, 19); PLEADING (1-3); PRINCIPAL AND AGENT (6); RAILROADS (1-4); RES JUDICATA (1); STREET RAILWAYS (1).

NEGOTIABLE PAPER—See BILLS AND NOTES.

NEW TRIAL.

An application for a new trial on the ground that plaintiff's counsel misstated the evidence in his argument to the jury is properly denied, where no objection was made at the time by defendant's counsel, and their failure is sought to be excused only on the ground that they were not themselves sure that the language complained of was a misstatement. *Saltmarsh v. Chicago, etc., R. Co.*, 103.

See PARTIES (2).

NEWSPAPERS, NOTICE BY—See TAXATION (10).

NONJOINER—See PARTIES (1, 3, 4).

NOTICE.

Actual possession of land is constructive notice to purchasers of a claim thereto. *Holmes v. Deppert*, 275.

See FENCES (2); HIGHWAYS; MUNICIPAL CORPORATIONS (2, 6, 13, 14, 17); MUTUAL BENEFIT ASSOCIATIONS (2).

OPINIONS—See EVIDENCE (3, 8).

ORDER OF PROOF—See TRIAL (10).

ORDERS—See FALSE PRETENSES; MUNICIPAL CORPORATIONS (9); PROBATE COURTS.

ORDINANCES—See MUNICIPAL CORPORATIONS (18).

PAROL EVIDENCE—See CONSIDERATION (3); CONTRACTS (2, 5); EVIDENCE (1, 2, 10).

PARTIAL RELEASE—See MORTGAGES (2).

PARTIES.

1. The nonjoinder of a plaintiff in an action of tort, unless pleaded in abatement, can be taken advantage of by defendant only by way of restricting the plaintiff's recovery to his apportionable share of the damages. *Michaud v. Grace Harbor Lumber Co.*, 305.
2. Where two street-railway companies appear and plead the general issue to a declaration for personal injuries wherein they are joined as defendants, and both take part in the trial, upon which evidence is introduced tending to establish their liability, it is too late after verdict for one of them to raise the question that its co-defendant, from whose car plaintiff was thrown, was alone connected with the injuries, and that it was improperly joined as a defendant, and should be allowed a new trial. *Selby v. Detroit Railway*, 311.
3. Where two persons jointly contract with a third, both are necessary parties to an action on the contract against him. *Hallett v. Gordon*, 567.
4. Plaintiff, a married woman, brought suit against defendant for a breach of warranty in the matter of a sale of lands. It

PARTIES—Continued.

appeared that the lands were owned by a third person, in whose behalf defendant signed a land contract running to plaintiff and her husband. *Held*, that the facts did not necessarily establish a misjoinder or a fatal nonjoinder of parties, as plaintiff's husband might have been named in the instrument merely as an incident to the contract between his wife and defendant, and the latter, in making the deal, may have bound himself, relying upon his ability to secure ratification by the owner. *Id.*

See **BANKS AND BANKING** (1); **PARTNERSHIP** (1).

PARTITION.

Tenants in common cannot maintain a bill for partition against a co-tenant who has bid in the premises on foreclosure of an outstanding lien, without offering to contribute their proportionate shares in redemption from the sale. *Reed v. Reed*, 77.

PARTITION FENCES—See FENCES.**PARTNERSHIP.**

1. The rule that the administrator of a deceased partner is a necessary party to a bill for an accounting applies where the firm is composed of an individual and another firm, one of whose members is deceased. *Carpenter v. St. Clair Circuit Judge*, 323.
2. Express authority need not be shown in order to hold a member of a nontrading firm for the price of a horse purchased by his copartner, and necessary to the proper conduct of the firm business. *McPherson v. Bristol*, 354.
3. Evidence, in an action against a wife for the price of goods, that upwards of 40 notes, running through a period of several years, were given to plaintiffs, having only her signature, and that the business was done in her name, and the credit extended to her alone, was sufficient to justify a finding that she was a sole trader, and not a partner with her husband, though both testified that they were partners. *Johnson v. Costigan*, 596.

See **ACCOUNTING**; **TRIAL** (14, 20).

PART PERFORMANCE—See STATUTE OF FRAUDS.**PAVING CONTRACTOR, RIGHTS OF—See MUNICIPAL CORPORATIONS** (19).**PAYMENTS—See ESTOPPEL** (1); **INTEREST**; **MORTGAGES** (4, 5); **TAXATION** (18).**PEDDLERS—See MUNICIPAL CORPORATIONS** (18).**PERSONAL INJURIES—See ACTIONS**; **CONSTITUTIONAL LAW** (8); **CONTRIBUTORY NEGLIGENCE** (1-5, 8); **MASTER AND SERVANT**; **MUNICIPAL CORPORATIONS** (1, 2, 5, 6, 15-17); **PARTIES** (2); **PLEADING** (1); **RAILROADS** (1-4); **RES JUDICATA** (1); **STATUTE OF LIMITATIONS** (8); **STREET RAILWAYS** (1).

PLEADING.

1. Where, in an action against a railroad company for personal injuries, brought by a brakeman who was struck, while climbing the side ladder of a car, by a telegraph pole alleged to have been placed too near the track, the declaration averred that it was necessary for him to ride on the ladder, and the proofs showed only that he was expected so to ride when climbing to the top of a car, there was no such variance as would work a surprise to defendant. *Potter v. Detroit, etc., R. Co.*, 179.
2. A count alleging failure to erect sufficient barriers to prevent the sliding of snow and ice from a roof, and one alleging failure to keep such barriers in repair, are not so inconsistent as to require an election. *Ferris v. Board of Education of Detroit*, 316.
3. Where plaintiff, who had alleged in his declaration that, as he approached a railroad crossing, he slowed his horse down to a very slow walk, and looked and listened for trains, and that he continued so to do until he was struck by a train, which he had been unable to see because of obstructions,—was given leave to amend his declaration so as to cover testimony that he stopped his horse, leaned forward, and looked out at the side of his closed carriage, and refused so to amend, the admission of the testimony was reversible error. *Britton v. Michigan Cent. R. Co.*, 359.
4. The question of limitations as a defense in an action at law cannot be raised by demurrer. *Renackowsky v. Board of Water Com'rs of Detroit*, 613.

See AMENDMENTS; CRIMINAL LAW (1, 2); EQUITY PLEADING; FALSE PRETENSES (1, 2); FORGERY.

POSSESSION OF CHATTELS—See REPLEVIN (1, 2).

POSSESSION OF LANDS—See ADVERSE POSSESSION; NOTICE.

POSTPONEMENT OF SALE—See MORTGAGES (6).

PRACTICE IN CIRCUIT COURT—See AMENDMENTS; JUDGMENTS; TRIAL; WRIT AND PROCESS.

PRACTICE IN SUPREME COURT — See APPEAL AND ERROR; MANDAMUS.

PREFERENCES—See ESTATES OF DECEDENTS (2).

PRESUMPTIONS—See BILLS AND NOTES.

PRINCIPAL AND AGENT.

1. Where the manager of a professional baseball team referred a player to the captain of the team, with the statement that the captain was his sole manager, and whatever he did "went," he is bound by a contract for the employment of the player, entered into by the captain on his behalf, whether or not the captain had authority from him to make it. *Scheibeck v. Van Derbeck*, 29.

PRINCIPAL AND AGENT—Continued.

2. An agent for the sale of real estate has no right to bid it in for himself at a sale on foreclosure of a mortgage thereon, and, if he does so, equity will require him to account therefor to his principal; and the rule is not altered by the fact that he notified the principal, several days prior to the sale, of his intention to purchase on his own behalf. *Kimball v. Ranney*, 160.
3. The fact that the principal obtained an order for a resale of the premises, and afterwards, being unable to comply with the conditions of the order, or to effect a settlement with the agent, accepted the surplus moneys arising from the sale, and then waited from three to four years before proceeding against the agent for an accounting, does not amount to a ratification of the sale, or estop the principal from claiming that it inured to his benefit. *Id.*
4. Nor is he precluded from obtaining relief because of his laches, where his rights in the premises were at all times denied by the agent. *Id.* 161.
5. In accounting for the proceeds of the transaction, however, the agent should be allowed interest on his disbursements. *Id.*
6. An accident happened from the manner in which the mooring line of defendant's steamer was handled on plaintiff's dock. The man handling the line was an employé of plaintiff, but performed the service in question at the request of the captain of defendant's steamer, such duty not being in the line of his regular employment. *Held*, that he was the agent of defendant, and his negligence must be imputed to it. *Pittsburgh & Conneaut Dock Co. v. Detroit Transportation Co.*, 445.

See ASSUMPSIT (3); BANKS AND BANKING (2); BILLS AND NOTES; ESTOPPEL (1, 3); EXECUTION; FIRE INSURANCE (1, 3); INSURANCE (1); MORTGAGES (4, 5); PARTIES (4); TRIAL (10).

PRINCIPAL AND SURETY—See CONSIDERATION (1, 4).

PROBABILITIES—See EVIDENCE (12).

PROBABLE CAUSE—See MALICIOUS PROSECUTION.

PROBATE COURTS.

Where, on hearing a widow's petition for support pending the settlement of her husband's estate, the probate judge entered a memorandum in his docket, "Widow allowed net income for support," such memorandum did not constitute an order, and cannot be considered on appeal from a decree approving payments made to the widow by the executor and trustee. *Dickinson v. Henderson*, 583.

See ESTATES OF DECEDENTS; GUARDIAN AND WARD; WILLS (8).

PROMISSORY NOTES—See FORGERY (2).

PROOFS OF LOSS—See INSURANCE (2); MUTUAL BENEFIT ASSOCIATIONS (3).

PROSECUTING ATTORNEYS—See GRAND JURY (3).

PROXIMATE CAUSE—See MUNICIPAL CORPORATIONS (5, 16).

PUBLICATION—See TAXATION (10).

PUBLIC IMPROVEMENTS—See MUNICIPAL CORPORATIONS (8, 17).

PUBLIC LANDS.

A government patent, without reservation, of the land bordering on an unmeandered lake, vests in the patentee the title to an unsurveyed island in the lake, which cannot be affected by the action of the government in subsequently causing the island to be surveyed and offered for sale through the regular channels. *Church v. Case*, 554.

See ESTOPPEL (2).

PUBLIC OFFICERS—See COUNTY TREASURERS; EMBEZZLEMENT (1); MUNICIPAL CORPORATIONS (10-14).

PUBLIC POLICY—See GRAND JURY (3).

QUESTIONS FOR COURT—See CONTRIBUTORY NEGLIGENCE (1, 3, 5, 8); MALICIOUS PROSECUTION (2); MASTER AND SERVANT (3-5, 7); RAILROADS (2, 4).

QUESTIONS FOR JURY—See CONTRIBUTORY NEGLIGENCE (2, 6); CRIMINAL LAW (9, 12); MARRIAGE (1); MASTER AND SERVANT (1, 2); MUNICIPAL CORPORATIONS (1); NEGLIGENCE (1, 2).

QUO WARRANTO—See MANDAMUS (7, 8).

RAILROADS.

1. A city, pursuant to a vote of the electors, entered into a contract for the payment of a sum of money to a railroad company for erecting a bridge to carry over the tracks a street that had formerly been crossed at grade. The company agreed to maintain the masonry and foundations, but turned the superstructure and approaches over to the city, which took possession, and thereafter made certain repairs, resulting in an accident by which plaintiff was injured. It did not appear that the company was under any legal obligation to change the grade crossing to an overhead crossing. *Held*, that, even if the contract of the city was *ultra vires*, the company was not liable for the injuries. *Wetherbee v. Michigan Cent. R. Co.*, 1.
2. Where, in an action against a railroad company for causing the death of plaintiff's intestate, it appeared from the undisputed testimony of the engineer and fireman of defendant's train that they gave proper signals of warning when they saw decedent on the track some distance ahead of the train, and that he, in apparent recognition of the signals, made a movement as if to step out of the way, but resumed his position of

RAILROADS—Continued.

- danger too late to permit of the train's being stopped in time to avoid striking him, it was error to permit the jury to find a verdict for plaintiff upon the theory that the failure to stop the train in time was due to the wanton and willful negligence of defendant's servants. *Starbard v. Detroit, etc., R. Co.*, 232.
3. The requirement that employers shall furnish their employés with a reasonably safe place in which to work applies to its full extent to railroad companies. *Fahlan v. Detroit, etc., R. Co.*, 232.
4. Where the undisputed evidence shows that the place furnished by a railroad company to its employés conforms to the general condition upon other roads, the court may say, as a matter of law, that the company has performed its duty in this respect; and the court may properly so instruct the jury where the alleged defect is the maintenance of a coal-bin in close proximity to a siding, it being able to take judicial notice that those structures are commonly so placed. *Id.*
5. Where a coupon ticket was issued to plaintiff for carriage between A. and C., through the intermediate point B., over defendant's line from a point east of B. to C. and over a connecting line from A. to such point, and the conductor on the connecting line detached by mistake the coupon "B. to C.," leaving plaintiff the "A. to B." coupon to present to defendant's conductor for passage to C., the conductor was bound to honor the ticket for carriage as far as B., and his attempt forcibly to eject plaintiff before the car reached B. was an assault, for which defendant was liable. *Vining v. Detroit, etc., Ry.*, 248.
6. A deed to a railroad company of right of way, absolute upon its face, will not be set aside, where neither fraud nor mistake as to its terms is shown, on account of the company's moving its depot to a point some distance from the land conveyed, though the grantor's belief that a depot would be maintained near by was the principal reason for his giving the deed. *Parsons v. Detroit, etc., R. Co.*, 462.
7. Under 2 Comp. Laws 1897, § 6234, subd. 9, establishing a rate of fare of 3 cents per mile for certain railroads, a company may lawfully charge only 19 cents for carrying a passenger 6.48 miles; the fraction over being less than one-half cent. *Chamberlain v. Lake Shore, etc., R. Co.*, 477.

See CONTRIBUTORY NEGLIGENCE (3-5, 8); DAMAGES (5, 6); MASTER AND SERVANT (1, 2, 4); PLEADING (1, 3); STREET RAILWAYS; WITNESSES (3).

RAPE.

The crime of rape being established, under 3 Comp. Laws 1897, § 11489, by proof of intercourse with a girl under 16 years of age, it is immaterial that the girl made no outcry or resistance. *People v. Smith*, 284

RATIFICATION—See PRINCIPAL AND AGENT (3).

RECEIVERS—See BANKS AND BANKING (1).

RECORDING LAWS—See EXECUTION.

REFORMATION OF CONVEYANCES—See DEEDS.

RELEASE AND DISCHARGE—See CONSIDERATION (3).

RELEASE OF SURETY—See CONSIDERATION (4).

REMOVAL OF OFFICERS — See MUNICIPAL CORPORATIONS (12-14).

REPLEVIN.

1. 3 Comp. Laws 1897, § 10660, providing that in replevin, if the goods and chattels specified in the writ shall not be found, or shall not be delivered to the plaintiff, he may proceed in the action for the recovery of the same, or the value thereof, does not authorize a recovery for goods not in defendant's possession when the writ was sued out. *Reid, Murdoch & Co. v. Parks*, 363.
2. Goods not in the possession of defendant in replevin on the day the writ issued were presumably not in his possession when the writ was sued out. *Id.*
3. Under 3 Comp. Laws 1897, § 10659, requiring the officer to summon defendant in replevin by delivering to him a "certified copy" of the writ, service by delivery of a copy which omits the name of the justice in the place for his signature is irregular, and, on failure of plaintiff to remedy the defect, the proceedings should be dismissed. *Chapelle v. Webster*, 482.

See COSTS; ESTOPPEL (3); JUSTICES OF THE PEACE; MANDAMUS (6); RES JUDICATA (2).

REPUTATION—See CRIMINAL LAW (4).

REQUESTS TO CHARGE—See TRIAL (3, 4, 14, 16).

RESIDUARY LEGATEES—See ESTATES OF DECEDENTS (2, 3).

RES JUDICATA.

1. A holding, upon appeal of an action for personal injuries, that the circuit judge was in error in directing a verdict for defendant for the reason stated by him,—that there was no evidence that defendant was negligent,—does not establish plaintiff's right to go to the jury upon a subsequent trial, wherein she is claimed to have been guilty of contributory negligence, a point not raised on the original appeal. *Howey v. Fisher*, 43.
2. A judgment in replevin for such portion of the goods described in the writ as were in defendant's possession when the writ was sued out is not a bar to an action of *assumpsit* for the value of the remainder. *Reid, Murdoch & Co. v. Parks*, 363.

See TAXATION (12).

RESTRAINT OF TRADE—See CONTRACTS (3, 4).

RESULTING TRUSTS—See EXECUTION.

REVIEW, BILL OF—See MORTGAGES (7).

REVIVAL OF ACTIONS.

The fact that an order reviving a suit in the name of plaintiff's administrator was signed by the attorneys, instead of by the court, is immaterial, where defendant afterwards pleaded the general issue without raising the objection, and, from the showing made, the court would have granted the order as of course. *Ferguson v. Wilson*, 97.

REVIVOR—See MORTGAGES (3).

SALE—See BANKRUPTCY; BILLS AND NOTES; CONSIDERATION (1); CONTRACTS (1-5); DAMAGES (3, 4); EVIDENCE (10); MORTGAGES (6).

SALOONS—See INTOXICATING LIQUORS.

SCHOOLS AND SCHOOL DISTRICTS—See MUNICIPAL CORPORATIONS (5, 6).

SERVICE OF PROCESS—See WRIT AND PROCESS.

SETTLEMENT—See COUNTY TREASURERS; LACHES.

SEWERS—See MUNICIPAL CORPORATIONS (8, 17).

SHEEP-KILLING DOGS—See DOGS.

SHIPPING—See CONTRIBUTORY NEGLIGENCE (6); NEGLIGENCE; PRINCIPAL AND AGENT (6).

SIDEWALKS—See CONTRIBUTORY NEGLIGENCE (1, 2); MUNICIPAL CORPORATIONS (1, 2).

SLANDER—See LIBEL AND SLANDER.

SPECIFIC PERFORMANCE—See HOMESTEAD (1).

STATUTE OF FRAUDS.

Part performance of a contract for the sale of land, invalid because not in writing, does not make it valid, so as to permit an action at law for its breach. *Hallett v. Gordon*, 567.

See LANDLORD AND TENANT (2).

STATUTE OF LIMITATIONS.

1. When, through a sheriff's failure to make return of a summons in due season, a suit is abated, the plaintiff may commence anew at any time within a year, though the statute of limitations has in the meantime run against the claim; 3 Comp. Laws 1897, § 9738, giving a plaintiff such right where the original writ fails of a sufficient return "by any default or neglect of the officer to whom it is committed." *Ricaby v. Gentle*, 336.

STATUTE OF LIMITATIONS—Continued.

2. An assignee in bankruptcy, appointed by a United States district court for Michigan, is a "ministerial officer of a court of competent jurisdiction within this State," within 3 How. Stat. § 8698, subd. 1, barring a right of entry, after the lapse of five years, against one occupying land under a deed from such an officer. *Potter v. Martin*, 542.
3. In an action for personal injuries, plaintiff may meet a defense of limitation by showing that defendant, by promising a settlement, led him to believe that a suit to enforce his claim was unnecessary. *Renackowsky v. Board of Water Com'rs of Detroit*, 614.

See ADVERSE POSSESSION; EQUITY PLEADING (1); PLEADING (4).

STATUTES—See CONSTITUTIONAL LAW.

STIPULATION—See GRAND JURY (3).

STOCK, CORPORATE—See BANKS AND BANKING (2); CONSIDERATION (3); CORPORATIONS (9).

STREET RAILWAYS.

1. An instruction, in an action against a street-railway company for personal injuries, that a carrier of passengers "must afford such care as is reasonably necessary to look after women and children in their alighting as well as their passage," is objectionable, as likely to be understood to mean that the conductor must assist women and children to alight. *Selby v. Detroit Railway*, 311.
2. A right conferred upon a street-railway company, by resolution of a township board, to extend its line through the township to connect with another line, the connection to be made within a stated time after the completion of such other line, by which resolution it is provided that the "franchise" shall be void unless accepted in writing by the company,—when so accepted, constitutes a franchise, not subject to revocation. *Township of Hamtramck v. Rapid Railway Co.*, 472.
3. A willful disregard by the company of the conditions of its franchise with respect to the time within which the line should be built would entitle the township to maintain a bill to forfeit the franchise. *Id.*
4. A street-railway franchise provided for the construction of the R. railway to connect with the D. railway, the connection to be made within two years after the "completion" of the D. railway. *Held*, that the term "completion" meant such a completion of the D. railway as would enable the heavy cars of the R. railway to pass safely over its tracks, and not merely such a completion as was sufficient to accommodate the lighter cars of the D. railway. *Id.*
5. Under a street-railway franchise providing that the track should be laid on the north side of a country highway, and in such manner as to obstruct as little as possible the free

STREET RAILWAYS—Continued.

passage of vehicles "along" the said highway, and that the portion of the roadway lying adjacent to the south rail of the track should be properly dressed to the track, in order that vehicles might easily cross, the company must continue the grading of the highway upon the track wherever it is within the 16-foot driveway used by vehicles, but, where it is wholly without such driveway, it need only grade to the south rail. *Township of Springwells v. Detroit, etc., Ry.*, 486.

6. A franchise to a street-railway company by a village, providing for the sale of tickets on cars of the company, good either way between the village and a specified city, in strips of five at a reduced rate, requires such tickets to be kept for sale on cars at any point on the line, and not solely at points within the limits of the village. *Rice v. Detroit, etc., Ry.*, 677.
7. Where a street-railway company neglected to furnish its conductors with through tickets, good between a village and a city, for sale at a reduced rate, as required by its franchise, but provided, in lieu thereof, coupon tickets in two parts, one good between the village and an intermediate point and the other between that point and the city, it could not defend an action brought by a through passenger who was compelled to pay an increased fare because of his inability to obtain from the conductor at the intermediate point one of the coupon tickets aforesaid, upon the ground that the ticket demanded, and which it was accustomed to sell, was not the kind required by the franchise. *Id.*

See PARTIES (2); RAILROADS (5).

SURRENDER OF LEASE—See LANDLORD AND TENANT (1).

SURVEYS—See PUBLIC LANDS.

SWAMP LANDS—See TAXATION (11).

TAXATION.

1. An applicant to purchase state tax land, who deposits with the auditor general a sum sufficient to pay all taxes constituting a lien thereon, but without advising him of an unpaid current tax, is not entitled to a deed of the land as against a subsequent applicant who pays the current tax, and tenders to the auditor an amount sufficient to cover all demands against the land. *Hall v. Mann*, 13.
2. A purchaser of state tax land may maintain an application for a writ of assistance to put him in possession of the premises and cannot be compelled to resort to an action at law. *Beck v. Finn*, 21.
3. Under the provision of the tax law that, where a sale is set aside, "the amount paid at the time of the sale" shall be refunded to the purchaser (Act No. 154, Pub. Acts 1895, § 73), a purchaser of state tax land is entitled, on the original sale's being set aside, to have returned to him, not only the amount paid for the State's title, but also the amount of the subsequent taxes paid by him as a condition to the purchase, as

TAXATION—Continued.

required by section 84 of the law (Act No. 206, Pub. Acts 1893); and it is immaterial that the sale had in fact been declared void at the time of his purchase. *Auditor General v. Patterson*, 39.

4. The lien of the State is not lost as to subsequent taxes so returned, but may be enforced in the usual manner; the further provision of section 78, that the portion of the amount refunded that was originally assessed for county and township purposes shall be charged back to the county, applying only to the taxes for which the sale was made, and not to the subsequent taxes. *Id.*
5. *Auditor General v. Sparrow*, 116 Mich. 574, affirming the sufficiency of a record of equalization of taxes by a board of supervisors, approved. *Auditor General v. Ayer*, 136.
6. Under section 37 of the tax law of 1893, providing that if it shall appear to the board of supervisors, at its October session, that any certificate, paper, or record submitted to it is not properly certified, the board may authorize and require such defect or omission to be corrected, it is immaterial that the certificate of the board of review to an assessment roll is dated in the October following the review. *Id.*
7. An arrangement by a board of review that all lands owned by several taxpayers in the north half of the township shall be assessed at a uniform value is invalid. *Id.*
8. Where the board of review meets and acts upon the question of values at the time provided by law, it is immaterial that the entry upon the roll of the values so fixed is not made until afterwards. *Id.*
9. A decree for the sale of land for taxes is void where, on the day fixed for hearing the auditor general's petition, the court adjourned to a day six days later, and on that day adjourned to a day four days later, on which day the decree was rendered; the taxpayer being entitled, under section 66 of the tax law (Act No. 206, Pub. Acts 1893), to five court days, after the day fixed for the hearing, in which to ask leave to file objections to the tax. *Miller v. Brown*, 147.
10. Under section 98, subd. 3, of the tax law of 1893, authorizing the auditor general to refund the purchase price of lands sold for taxes in case the sale was made in contravention of any of the provisions of the act, *mandamus* will lie to compel the auditor to cancel a deed of state tax land, and to refund the amount paid therefor, where the notice of the original sale on which the deed is based was published in a newspaper printed in the Holland language. *Gurd v. Auditor General*, 151.
11. Upon the people's appeal, the decree of the circuit court, declaring invalid the taxes assessed for certain years against part-paid swamp lands, and sustaining the validity of the taxes assessed against them for other years, was affirmed. *People, ex rel. Attorney General, v. A. P. Cook Co.*, 453.
12. Where, upon an application for a writ of assistance by the holder of a tax title, the owner appears, and questions the

TAXATION—Continued.

jurisdiction of the court to enter the decree of sale, an order overruling the objections so raised, and directing the issuance of the writ, is *res judicata* as to the validity of the decree, precluding the owner from afterwards attacking it in an action of ejectment, even though on different grounds. *Peters v. Youngs*, 484.

13. A tax is not paid by the giving of a check therefor to the collecting officer, but the lien continues until presentation and payment of the check. Hence, an applicant to purchase state tax land, required by section 84 of the tax law, as a condition to the purchase, to pay all taxes remaining a lien upon the land, who pays the current taxes by check to the local treasurer, is entitled to a deed of the land as against a prior applicant whose application was filed after the giving of the check but before its payment by the bank. *Moore v. Auditor General*, 599.

See CONSTITUTIONAL LAW (4-7); MUNICIPAL CORPORATIONS (7); TOWNSHIPS (2).

TENANCY IN COMMON—See HOMESTEAD (3); PARTITION.

TICKETS—See RAILROADS (5); STREET RAILWAYS (6, 7).

TITLE TO LANDS.

- 1 Comp. Laws 1897, §§ 782, 789, which provide that a defendant prevailing in the circuit court in a suit which he caused to be certified from justice's court upon his notice that the title to land was involved shall not recover his costs if the trial judge shall certify that title did not come in question, but shall in such case pay costs to the plaintiff, contemplate that causes so certified shall be tried in the circuit court upon the merits, and it is therefore error for a circuit judge to dismiss such a case for want of jurisdiction upon a finding merely that title is not involved. *Taylor v. Montcalm Circuit Judge*, 692.

See DOWER.

TITLE TO OFFICE—See MANDAMUS (7, 8).

TITLE TO STATUTES—See CONSTITUTIONAL LAW (4).

TORTS—See ACTIONS; ASSUMPSIT; PARTIES (1).

TOWNSHIPS.

1. A township board has no power, at least in the absence of authority conferred upon it by the electors legally assembled, to bind the township to pay for money and labor expended in putting land owned by the township in condition to be rented to a county agricultural society for use in holding annual fairs. *French v. Township of South Arm*, 593.
2. One who, under the supervision of a township board, expends money and labor in improving township lands, with the design of putting them in condition for use as fair grounds, is entitled to have applied upon his claim against the township

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TOWNSHIPS—Continued.

for the money and labor so expended a fund raised by vote of the electors for the making of such improvements, even though his agreement is invalid for want of authority in the township board to make it. *Id.*

See STREET RAILWAYS (2-5).

TRESPASS—See ASSUMPSIT (1); EQUITY JURISDICTION (1); MUNICIPAL CORPORATIONS (5).

TRIAL.

1. For the trial judge to give an instruction which, standing alone, might be taken as an indication of his opinion of the merits of the controversy, but which, in connection with the testimony and the remainder of the charge, is not calculated to be so understood by the jury, does not warrant a reversal. *Henry v. Henry*, 6.
2. It is not error to exclude from evidence letters and telegrams which merely tend to prove admitted facts, and do not relate to the vital question in controversy. *Scheibeck v. Van Derbeck*, 29.
3. A request to charge which assumes the existence of fraud on the part of an insolvent in the transfer of his stock of goods is properly refused, where there is evidence from which the jury might find that the transfer was in good faith. *Gordon v. Alexander*, 107.
4. Refusal to give an instruction to which appellant was entitled will not warrant a reversal, where the verdict, viewed in the light of the general charge, shows that the refusal worked no harm to the appellant. *Id.*
5. Where the trial judge does nothing to check plaintiff's counsel in the use in his argument of language so intemperate and improper as to be prejudicial to defendant, it is reversible error. *Potter v. Detroit, etc., R. Co.*, 179.
6. Under Cir. Ct. Rule No. 24, subd. b, providing that counsel on either side shall be allowed at least a half hour in which to sum up the case to the jury, and that no more than two hours shall be allowed unless the court otherwise orders, the court has discretion to limit counsel in a criminal case to 35 minutes, and to stop them at the expiration of that time. *People v. Smith*, 284.
7. An objection which is overruled is waived by failure to except to the ruling. *Selby v. Detroit Railway*, 311.
8. Counsel should not be allowed to contradict witnesses without themselves being sworn. *Id.*
9. In an action for personal injuries, it was error to permit plaintiff's counsel, in commenting upon the verdict to be rendered, to declare to the jury that the defendant, a corporation, always carried its cases to the Supreme Court. *Id.*
10. While the practice of permitting testimony of acts and directions of a supposed agent, before proving the authority, is to

TRIAL—Continued.

- be condemned, a judgment will not be set aside because such testimony was admitted and the authority not shown, where, in view of instructions to the jury to disregard the testimony, there is no reason to believe that it was prejudicial. *Hume v. Mason & Hoge Co.*, 346.
11. A judgment will not be reversed for improper remarks of counsel, where it appears that they were promptly ruled out by the court, and the counsel reprimanded for making them. *Id.*
 12. In an action to recover an alleged overcharge of interest upon notes on which partial payments were made from time to time, error in permitting plaintiff's witness to place before the jury, over defendant's objection, a computation made on a basis not approved in this State, will be held prejudicial, though the court, in its final instructions, correctly stated the Michigan rule, unless it clearly appears from the verdict that it was not affected thereby. *Foley v. Comstock*, 349.
 13. Where defendant objected to impeaching testimony's being received unless his witness should be recalled, and his attention directed to the conversation by which he was sought to be impeached, and plaintiff's counsel thereupon stated that, if necessary, he would recall the witness, which the court said might be done after the impeaching witness was through, and defendant accordingly held his exception until, by plaintiff's calling a third witness, it was evident that the omission was not to be supplied, his exception then taken should be treated as covering the original ruling. *Id.*
 14. Where a partner, sued on a debt contracted by his copartner, defends on the theory of nonliability, and fails to demand recoupment of damages, he cannot complain of a refusal to charge that proof that the property was of little value was competent as tending to show the seller's bad faith. *McPherson v. Bristol*, 354.
 15. Where testimony which was inadmissible except for a single purpose was received throughout a criminal trial under rulings which were calculated to give the jury an erroneous impression, prejudicial to respondent, as to the purpose for which it was competent, the error was not cured by an obscure reference in the general charge to its proper purpose. *People v. Thompson*, 412.
 16. The refusal of requested instructions proper to be given is not error where they are fully covered in the general charge. *Pittsburgh & Conneaut Dock Co. v. Detroit Transportation Co.*, 446.
 17. Where plaintiff's right to recover was clear, and the only question related to the amount of damages, the court refused to reverse an award which was reasonable in amount, because of intemperate and ill-chosen remarks in the argument of plaintiff's counsel. *Chamberlain v. Lake Shore, etc., R. Co.*, 477.
 18. An objection to the admission of evidence will not be con-

TRIAL—Continued.

sidered on appeal, where the charge of the court practically withdrew such evidence from the consideration of the jury, and the verdict shows that they were not prejudiced by it. *Field v. Magee*, 556.

19. A party cannot complain of the exclusion of certain evidence, where the court afterwards intimated to him that he would consider a new offer of such testimony, and he failed to renew the offer. *Id.*
20. Where, in an action against a wife for the price of goods, the jury were explicitly told that if, as defendant claimed, the goods were sold to defendant and her husband as partners, there could be no recovery in that action, a further instruction that, notwithstanding "they were doing business with other people, they had a right to make this contract, * * * and, if they made it, they are bound by it," was not prejudicially erroneous, though, standing alone, it might be held misleading. *Johnson v. Costigan*, 596.
21. It is reversible error for the trial court to allow the introduction of testimony as to matters outside the issue, calculated to prejudice the jury against one of the parties. So *held*, where certain irrelevant verses, written by plaintiff upon the reverse of a letter to defendant's attorney, were permitted to be read in evidence. *Stevens v. Beardsley*, 671.

See APPEAL AND ERROR (1, 4, 5, 9); COUNTY TREASURERS (1); CRIMINAL LAW (5, 9, 11, 12); LIBEL AND SLANDER (3); NEW TRIAL; PARTIES (2).

TROVER—See DAMAGES (1).

TRUSTS AND TRUSTEES—See EXECUTION; WILLS (4).

ULTRA VIRES—See MUNICIPAL CORPORATIONS (7); RAILROADS (1); TOWNSHIPS.

VACANCY IN OFFICE—See MUNICIPAL CORPORATIONS (11, 18).

VARIANCE—See PLEADING (1, 3).

VENDOR AND PURCHASER.

1. Where the purchaser's covenants, in a contract for the sale of land, to pay installments of interest and taxes, are not dependent upon the conveyance or tender of conveyance by the vendor, the latter may maintain an action at law for such interest and taxes paid by him, without any tender. *Foley v. Dwyer*, 587.
 2. An assignment of the purchaser's interest under an executory contract for the sale of land to one who agrees, in consideration of the vendor's assent, to fulfill the obligations of the purchaser, though consented to in writing by the vendor, is insufficient to release the assignor from liability upon a covenant to pay interest and taxes. *Id.*
- See ADVERSE POSSESSION (3); BANKRUPTCY (1, 4); DEEDS (2); DOWER; HOMESTEAD (2).

VERDICT, DIRECTION OF—See CRIMINAL LAW (12).

VERDICT, FORM OF—See LIBEL AND SLANDER (3).

VILLAGES—See MUNICIPAL CORPORATIONS.

WAIVER—See ASSUMPSIT; CONTRACTS (4); CORPORATIONS (8);
INSURANCE (2); MARRIAGE (1); MUNICIPAL CORPORATIONS (9);
TRIAL (7, 19); WILLS (4); WRIT AND PROCESS.

WARRANTY—See DAMAGES (8, 4); EVIDENCE (10); MORTGAGES
(8); PARTIES (4).

WATERS—See EQUITY JURISDICTION (1).

WATERWORKS—See CONSTITUTIONAL LAW (4-7).

WAYNE COUNTY JURY ACT—See GRAND JURY (2).

WIDOWS—See DOWER; ESTATES OF DECEDENTS (1); WILLS (5).

WILLS.

1. Under a will devising testatrix's property to her brothers and sisters, share and share alike, but providing that, in case of the death of any legatee "previous to the probating or execution" of the will, his share should go to his children, the children, and not the assignee, of a deceased legatee are entitled to his share, where his death occurred after the probate of the will, but prior to its execution by settlement of the estate. *In re Lamb's Estate*, 239.
2. Under a will devising property to testator's wife "during her natural life; that is to say, that she shall have it as needed for her support and comfort," with remainder to testator's heirs, and nominating the wife and a nephew as executors, the nephew being requested to "continue right along as executor," to see that the will is carried out, and to settle the business after the death of the wife, and requiring each to give bonds, the wife to the amount of one-half, the nephew to the full amount, of the estate,—the wife is not entitled to the exclusive possession of the property during her lifetime, but only to a joint possession with her co-executor, with the duty resting on them to transfer to her such of the principal as may be needed for her support and comfort, should the income from the estate at any time prove insufficient for that purpose. *Hull v. Hull*, 388.
3. Under such a will the probate court has no jurisdiction, unless the executors disagree, to assume the function delegated to them of determining the amount to be paid to the wife. *Id.* 389.
4. The fact that testator's widow, entitled under the will to the income of his estate for life, failed to make any claim on the executors before the approval of their accounts showing that such sums had been turned over to trustees under the will, did not constitute a waiver of her right to the income so paid over, there having been no final order for the distribution of the fund. *Dickinson v. Henderson*, 583.

WILLS—Continued.

5. Moneys shown by an executor's final account, as approved by the probate judge, to have been paid to the widow for her support, will be treated as made from the testator's estate, and not from the income thereof bequeathed to the widow, though no formal order was entered on her petition for such an allowance. *Id.*
6. An executor, charged with the duty of paying over to the widow the "net income" of the estate, must deduct, before making payment of the income, the necessary expenses, such as taxes, repairs, and costs of collection, incurred in caring for the estate. *Id.*

See ESTATES OF DECEDENTS (2, 3).

WITNESSES.

1. One entitled to have property devised to her, who yields her claim, and consents to its being devised to her children, is an assignor, within 3 Comp. Laws 1897, § 10212, prohibiting an assignor of a cause of action from testifying to matters equally within the knowledge of a deceased defendant, and, in an action by the children, cannot testify to promises made by the deceased to her to leave it to them. *Berry v. Adams*, 17.
2. The fact that a defendant, in attempting to give the substance of a deed claimed to have been drawn by him and subsequently lost, indicated at first an insufficient description, but corrected his testimony, upon being recalled, so as to denote that the property was properly described, is no ground for disturbing a judgment based upon the existence of the deed; the circumstance, if suspicious, being for the jury to consider. *Holmes v. Deppert*, 275.
3. The testimony of the occupants of a closed carriage, struck by a train at a railroad crossing, that, although they stopped two rods from the track, and listened, they heard no crossing signals, does not rise to the dignity of evidence, so as to take the question to the jury, where all the members of the train crew, and a bystander, an entirely disinterested witness, testify positively that the signals were given, and state the reasons for their recollection. *Britton v. Michigan Cent. R. Co.*, 359.

See CRIMINAL LAW (9); EVIDENCE (3, 8, 12); TRIAL (18).

WORDS AND PHRASES: ASSIGNOR—See WITNESSES (1).

ATTEMPT—See CRIMINAL LAW (6).

CLAIMS — See CONSTITUTIONAL LAW (3).

FAILURE IN BUSINESS—See CORPORATIONS (5).

INCLOSURE—See FENCES (1).

PRETENSE — See FALSE PRETENSES (4).

WRIT AND PROCESS.

In a civil action, not involving deprivation of liberty, pleading to the merits, after the denial of a motion to quash for defective service, operates as a waiver of the defect. *Improved-Match Co. v. Michigan Mut. Fire Ins. Co.*, 256.

See ATTACHMENT; CONFLICT OF LAWS; JUSTICES OF THE PEACE; REPLEVIN (3); STATUTE OF LIMITATIONS (1).

WRITS OF ASSISTANCE—See TAXATION (2, 12).

Ex. 1, 11.

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